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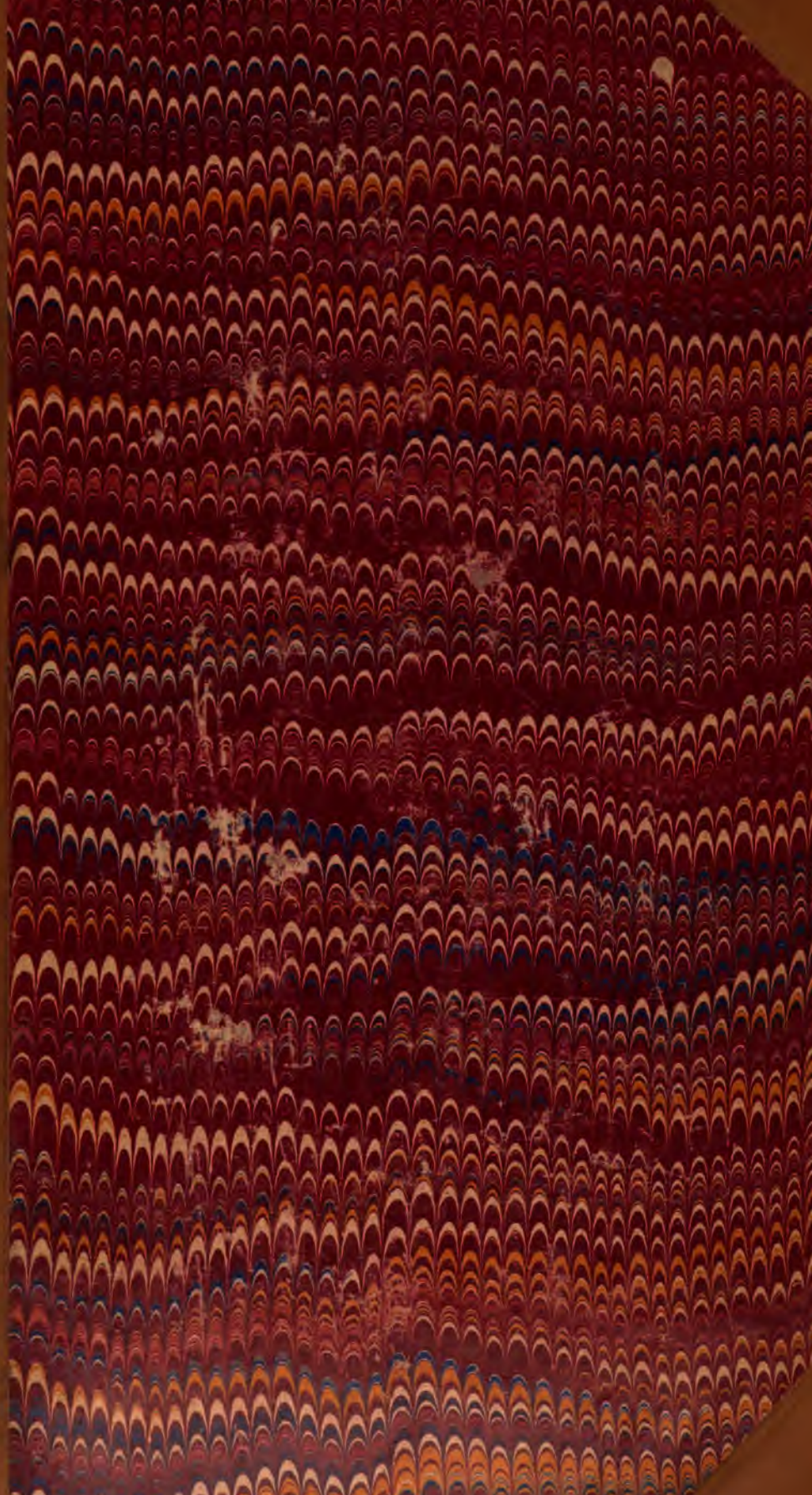
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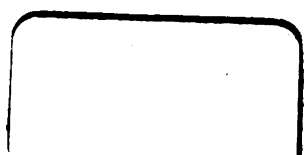
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# CANADIAN CRIMINAL CASES ANNOTATED.

A Series of Reports of Important Decisions in Criminal and Quasi-Criminal Cases in Canada under the Laws of the Dominion and of the Provinces thereof, with special reference to Decisions under the Criminal Code of Canada, 1892, in all the Provinces; with Annotations, a Table of Cases Cited and a Digest of the Principal Matters.

EDITED BY  
W. J. TREMEER,  
OF THE TORONTO BAR.

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## CASES REPORTED, VOL. III.

- ALBERTIE, R. v.** (ONT.)  
 Sunday observance—Sale of ice cream—Victualling house—Works of necessity—Statutes in pari materiâ—Construction—29 Car. II., c. 7—Lord's Day Act, Ontario, R.S.O. 1897, c. 246, s. 1. 356
- ASKWITH, RE.** (ONT.)  
 Witness—Privilege—Liquor License Act (Ont.)—Sale by licensee in prohibited hours—Penalty for being present in bar-room in prohibited hours—Liability of witness—Answer tending to subject him to prosecution—Habeas corpus—Ontario Evidence Act, sec. 5—Liquor License Act (Ont.), secs. 57, 59, 115. 78
- BAIRD, EX PARTE.** (N.B.)  
 Company—Sale of intoxicating liquors—Liability of manager for illegal sales by clerk—Canada Temperance Act. 65
- BARNFIELD, R. v.** (B.C.)  
 Practising medicine without being registered—Vendor of patent medicines—Asking symptoms—Diagnosis—Medical Act (B.C.). 161
- "BEAR'S SHIN BONE," R. v.** (N.W.T.)  
 Polygamy—Indian marriage with two women—Criminal Code 278 (a). 329
- BOUGIE, R. v.** (QUE.)  
 Habeas corpus—Jurisdiction—Summary trials of criminal offences—Appeal—Keeping disorderly house—Nuisance—Cr. Code 195, 198, 743, 744, 782a, 783, 784, 788, 808. 487

- BOWMAN, R. v.** (N.S.)  
Husband and wife—Failure to provide necessities for wife—Proof that wife's health likely to be permanently injured—Cr. Code 210 (2). 410
- BRAZEAU, R. v.** (QUE.)  
Libel—Plea of Justification—Motion for dismissal of plea—Publication in the public interest—Cr. Code 634. 89
- BURTRESS, R. v.** (N.S.)  
Magistrate—Summary trial of indictable offence—Aggravated assault—Conviction—Omission to recite consent of accused—Want of form—Costs—Default in paying fine—Imprisonment with hard labour—Jurisdiction—Forfeiture of fine—Cr. Code 783 (c), 788, 800, 859, 955 (6). 536
- COOK, EX PARTE.** (B.C.)  
Keeping a “disorderly house”—Gaming house—Jurisdiction of police magistrate to summarily try without consent of accused—Discretion to refuse summary trial asked for by accused—Alternative of preliminary inquiry—Cr. Code 198, 783, 784, 791. 72
- COVENTRY, R. v.** (N.W.T.)  
Duty to provide necessities—Contract for placing a child out to service—Master not liable as a “guardian” or “head of a family”—Failure to provide medical aid—Proof of permanent injury to health—Expert evidence—No inference from necessity of amputation—Cr. Code, 209, 210, 211. 541
- CROSSEN, R. v.** (MAN.)  
Obstructing a peace officer—Consent of accused necessary to summary trial—Jurisdiction of magistrate—Cr. Code 144, 783, 786. 152

- CUSHING, R. v.** (ONT.)  
Jurisdiction—Offence under provincial statute—  
Municipal law—Appeal from order of a superior  
court quashing summary conviction—Motion to  
quash appeal. 306
- DIXON, R. v. (No. 2).** (N.S.)  
Threatening with intent to extort—Proof of threaten-  
ing letter—Evidence of handwriting—Comparison  
by jury with admitted handwriting—Improper re-  
ception of document—Error cured by subsequent  
evidence—Cr. Code 406, 746 (*f*). 220
- DOE, RE.** (QUE.)  
Finding sureties to keep the peace—Commitment in  
default—Record of default—Recital in warrant—Cr.  
Code 959—Code form YYY. 370
- DOHERTY, EX PARTE.** (N.B.)  
Summary proceedings—Failure to have witness sign  
his depositions—Matter of procedure—Jurisdiction  
of magistrate—Cr. Code 590. 310
- DOHERTY, R. v.** (N.S.)  
Magistrate's summons—Defect in service—Service  
by unauthorized person—Appearance of defendant  
by counsel—Waiver—Objection by counsel—Coun-  
sel's withdrawal—Excessive penalty in default of  
distress—Irregular "costs of commitment"—  
Surplusage—Canada Temperance Act, ss. 117, 118  
—Cr. Code 855, 857, 872. 505
- DONOVAN, EX PARTE.** (N.B.)  
Summary conviction—Service of summons—Leav-  
ing at usual place of abode—Absence of accused  
from Canada—Jurisdiction of magistrate—Cr. Code  
562, 853. 286

- EATON, R. v. (No. 2). (ONT.)  
 False trade description—Advertisement of sale of goods—Incorrect description of silverplated ware as “quadruple plate”—Oral evidence to connect advertisement with goods sold—Admissibility—Cr. Code 443, 446. 421
- ELLIOTT, R. v. (ONT.)  
 Confession—Interrogation by police officer of accused in custody—Evidence—Admissibility of answers—Answers not unduly or improperly obtained. 95
- ETTINGER, R. v. (N.S.)  
 Summary proceedings—Issuing summons a judicial act—Canada Temperance Act, sec. 105—Necessity of two justices receiving the information—“Bringing a prosecution,” meaning of—Cr. Code, 559, 842, 843. 387
- GIBSON (JAMES), R. v. (N.S.)  
 Speedy trial—County Judge’s Criminal Court—Electing trial without a jury—“Committed to jail for trial,” meaning of—Admission to bail under Cr. Code 601 without a committal—Render by sureties—Transmission of depositions—Waiver of preliminary examination—Effect of, on claim to a speedy trial—Officer de facto—Cr. Code 600, 601, 765, 767, 910. 451
- GRAHAM, R. v. (ONT.)  
 Rape—Evidence—Statement of complainant after offence—Time and opportunity for complaint—Verdict of indecent assault—Cr. Code 259, 267. 22
- GREAT WEST LAUNDRY CO., R. v. (MAN.)  
 Manslaughter—Indictment of corporation for—Demurrer—Negligent maintenance of dangerous machinery—Unprotected shafting—Omission of legal duty—Cr. Code 3 (1), 213, 220, 639. 514

- HAMILTON (ALEX.), R. v.** (MAN.)  
 Bail—Reserved case—Admission to bail pending decision—Recognizance to appear “for sentence”—Order for new trial—Estreat of recognizance—Motion to set aside roll—Cr. Code 743 (5), 746 (3), 914, 916. 1
- HERRELL, R. v. (No. 2).** (MAN.)  
 Liquor license—Exception of sales by registered druggist—Evidence—Proof of registration—Alternative right of appeal—Discretion to refuse certiorari—Manitoba Liquor License Act—Manitoba Pharmaceutical Act. 15
- HORTON, R. v.** (N.S.)  
 Penalty—Summary conviction for unlawfully killing a dog—Adjudication of imprisonment with hard labour in default of paying fine and compensation—Imprisonment “in the manner and for the time” authorized—Power to award hard labour in the first instance—Habeas corpus—Imposing terms on ordering discharge—Cr. Code 501, 872, 955. 84
- KEMPEL, R. v.** (ONT.)  
 Accusing with intent to extort—“Accuse,” meaning of—Laying information before judicial tribunal, included—Cr. Code 405, 558. 481
- LAZIER, RE, (No. 1).** (ONT.)  
 Extradition—Forgery—Signature in name of non-existent person—False representations as to identity—Authorization of extradition proceedings by demanding country—Proof of requisition for extradition—Practice—Extradition Act, R.S.C. 1886, c. 142, ss. 6, 13. 167
- LAZIER, RE, (No. 2).** (CAN.)  
 Extradition—Habeas corpus—Appeal to Supreme Court of Canada—Motion to quash. 419



- McANN, R. v.** (B.C.)  
 Summary conviction—Punishment in excess of jurisdiction—Unauthorized penalty of hard labour—Certiorari—Return of an amended conviction—What amendments allowed and when to be made. 110
- McARTHUR'S BAIL, RE.** (N.W.T.)  
 Recognizance of bail—Estreat—Discretionary discharge—Jurisdiction—Court en banc—Civil proceeding—Cr. Code 922. 195
- McBERNY, R. v.** (N.S.)  
 Speedy trial before County Judge—Separate charges tried consecutively—Adjournment of trial—Verdict or finding reserved until conclusion of all trials—Illegality—New trial—Theft—Proof of intent—Evidence of similar acts—Cr. Code 777. 339
- MACDONALD, EX PARTE.** (CAN.)  
 Jurisdiction—Supreme Court of Canada—Habeas corpus—Judicial notice of local territorial divisions—Warrant of commitment—Stating locality where offence committed. 10
- McDONALD (Wm.), R. v.** (N.S.)  
 Magistrate—Summary conviction—Issue of summons—Information need not be sworn unless warrant to issue—Cr. Code 558, 559, 843, 845. 287
- McGUINNESS v. DAFOE.** (ONT.)  
 Arrest—Warrant without sworn information—Peace officer—Belief that offence committed—Jurisdiction of magistrate although arrest illegal—Cr. Code 22, 23, 558, 559. 139
- McINTYRE, R. v.** (N.S.)  
 Husband and wife—Failure to provide necessities for wife—Wife's health "likely to be permanently injured"—Evidence—Inferences—Reserved case—Question of fact or of weight of evidence not to be reserved—Cr. Code 210 (2), 743. 413

**McLEAN, R. v.**

(ONT.)

Police magistrate—Jurisdiction—Ex-officio justice of the peace—Powers under Police Magistrate's Act (Ont.)—Session in city having a separate magistrate—Validity—Intoxicating liquors—Diluted lager beer—"Temperance drinks"—Percentage of alcohol. 323

**McNUTT, R. v.**

(N.S.)

Summary proceedings—Information signed and sworn to by person other than person named therein as informant—Necessity for re-swearing after amendment—Objection taken by accused under arrest—Waiver. 184

**MOSHER, R. v.**

(N.S.)

Criminal trial court—Powers of presiding judge out of term—Reserved judgment on application in term—Order "nunc pro tunc"—Award of costs against private prosecutor when bill of indictment ignored—Review by court en banc—Jurisdiction. 312

**MOUNT, R. v.**

(ONT.)

Liquor license—Sale to interdicted person—Liquor delivered on his order but consumed by others—Order of interdiction—Requisites of—Ontario Liquor License Act, sec. 124. 209

**O'DEA, R. v.**

(QUE.)

Harbouring deserting seamen—Information—Failure to allege nationality of vessel—Evidence—Presumption—Constitutional law—Application of Seamen's Act (Can.)—Imperial Merchant Shipping Act—Desertion from registered British ship—Appeal from conviction—Practice—Seamen's Act, R.S.C. 1886, c. 74, s. 104—Cr. Code 742, 879, 880, 900. 402

- O'GRADY v. WISEMAN.** (QUE.)  
 Customs Act (Can.), sec. 197 (1888)—Keeping or  
 concealing goods imported without payment of  
 lawful duties—Penalty—Fine or imprisonment in  
 addition to forfeiture—Construction of statute. 332
- PARKE, RE.** (ONT.)  
 Police magistrate—Mandamus against—Refusal to  
 proceed with information—Review of magistrate's  
 decision refusing summons—Cr. Code, 138, 559. 122
- PATCHELL, EX PARTE.** (N.B.)  
 Canada Temperance Act—Sale of liquors—Military  
 canteen of infantry school corps—Sale of liquors to  
 men of active militia attending camp of exercise—  
 Canada Militia Act, R.S.C. 1886, c. 41. 75
- PETRIE, R. v.** (B.C.)  
 Gaming—Card game of "black jack"—Advantage  
 to dealer—Deal determined by chances of the game  
 —Common gaming house—Chances "not alike  
 favourable to all the players"—Cr. Code 196 (b),  
 198. 439
- PROCTOR v. PARKER.** (MAN.)  
 Summary conviction—Recital of adjournment of  
 hearing—Presumption—Onus of proving regularity  
 —Adjournment in absence of accused—Imprison-  
 ment in default of paying fine—Release from—  
 Validity of as consideration for a promissory note—  
 Fires Prevention Act (Man.)—Cr. Code 853, 857 (1)  
 —Code form WW. 374
- QUEEN v. ———.** (Indexed under name of defendant).
- RACINE, R. v.** (QUE.)  
 Summary trial—No right of appeal, except on trial  
 by two justices under Cr. Code 782a (5)—Code  
 amendment of 1895—Cr. Code 782, 783. 446
- REGINA v. ———.** (Indexed under name of defendant).

## RIENDEAU, R. v.

(QUE.)

Rape—Evidence of complaint by prosecutrix—Admissibility of details of complaint—Lapse of time between offence and complaint thereof—Proof of civil action for damages—Extortion—Cr. Code 266. 293

## ROY, R. v.

(QUE.)

Common bawdy house—Disorderly house—Offence of keeping—Criminal liability of owner leasing house for purposes of prostitution—Aiding and abetting—Accessory chargeable as a principal—Cr. Code 61 (b), 195, 198. 472

## ST. CLAIR, R. v.

(ONT.)

Summary trial—Being inmate of bawdy house—Evidence of reputation and disorderly conduct—Evidence in prior trial of another person as keeper—Consent to use of, as evidence in charge of being inmate—Cr. Code part LV.—Absolute jurisdiction of magistrate—Review on habeas corpus—Issuing writ of habeas corpus—Practice—Cr. Code 207, 690, 783, 784, 798. 551

## SAUNDERS, R. v.

(MAN.)

Dominion election law—Secrecy of ballot—Compulsory disclosure by witness at criminal trial. 278

## SAUNDERS, R. v.

(ONT.)

Common gaming house—Room kept for gain—Proof of gain—Voluntary allowances to proprietor out of stakes for refreshments served—Failure to prove allowance excessive—Cr. Code 196 (a), 198. 495

## SEITZ, EX PARTE (No. 1).

(QUE.)

Extradition—Power of extradition commissioner—Warrant against fugitive who is neither within, nor suspected to be within, his territorial jurisdiction—Execution of warrant in another province—Habeas corpus—Review of findings—Extradition treaty with Germany—Extradition Act, R.S.C. 1886, c. 142, s. 5 and 7—Cr. Code 305, 311. 54

- SEITZ, EX PARTE (No. 2). (QUE.)  
Extradition—Powers of extradition commissioner—  
Warrant against fugitive who is neither within nor  
suspected to be within his territorial jurisdiction—  
Arrest in another province—Discharge for want of  
jurisdiction—New complaint while fugitive within  
jurisdiction—Validity of fresh proceedings—Re-  
arrest—Habeas corpus—Res judicata—Proof of  
foreign law—Cr. Code 305, 311. 127
- SLEETH v. HURLBURT. (CAN.)  
Canada Temperance Act—Search warrant for liquors  
—Description of premises to be searched—Inclusion  
of various places in one warrant—Invalid warrant  
as a justification to officer executing it—Certiorari—  
Order quashing search warrant for liquors—Replevin  
against constable—Judgment in rem—Res judicata  
—Cr. Code 18. 197
- SMITH, R. v. (ONT.)  
Summary conviction—Invalid municipal by-law—  
Enacting clause more extensive than statute autho-  
rizes—Recital of exceptions under proviso of statute  
—Negating exception in conviction—Amendment  
—Ontario Municipal Act, R.S.O. 1897, c. 223, s.  
583 (14). 383
- SMITH, R. v. (N.S.)  
Speedy trial—Election of, by accused—Right limited  
to cases where “committed to gaol for trial”—  
Admission to bail by magistrate without a committal  
—Judge's order for render by sureties—Cr. Code  
596, 601, 765. 467
- SUPERIOR v. CITY OF MONTREAL. (QUE.)  
Jurisdiction—Appeal not a matter of procedure—  
Municipal license—Pawnbroker—Montreal City  
Charter, art. 503—Cr. Code 840, 879. 379



**THOMPSON v. DESNOYERS.** (QUE.)

Warrant of arrest—Magistrate's refusal to issue—  
Reasons for magistrate's "opinion"—Revision of  
magistrate's decision by mandamus—Cr. Code 558,  
559. 68

**TOWNSEND, R. v.** (N.S.)

Indictment—Written consent of Attorney-General to  
prefer—Requisites of—Grand jury—Initialing names  
of witnesses—Foreman's signature endorsed on bill  
of indictment—Omission of words "true bill"—  
Nova Scotia practice—Cr. Code 641, 645, 760. 29

**UNION COLLIERY CO., R. v.** (B.C.)

Corporation—Neglect of duty causing death—  
Maintaining unsafe railway bridge—Criminal pro-  
ceedings—Manslaughter—"Grievous bodily injury"  
—Punishment of corporation by fine—Cr. Code 192,  
213, 252, 639, 934. 523

**VACHON, R. v.** (B.C.)

Fishery regulations—Having in possession small  
sturgeon—Unauthorized possession by servant—  
Liability of master—Mens rea—Fisheries Act,  
R.S.C. 1886, c. 95, s. 18. 558

**VALLEAU, R. v.** (ONT.)

Medical registration—"Practising medicine," mean-  
ing of—Diagnosis—Manual manipulation—Massage  
—Ont. Medical Act, R.S.O. 1897, c. 176, s. 49. 435

**WEIR, R. v. (No. 1).** (QUE.)

Bank Act (Can.)—Officer making false bank return  
—Indictment—Form of—Sufficiency—Cr. Code 611. 102

**WEIR, R. v. (No. 2).****(QUE.)**

Signing document by procuration without authority  
 —Promissory note in name of an estate—Order for  
 particulars—Names of persons representing estate  
 —Indictment pending preliminary enquiry—Judge's  
 direction to prefer indictment as a "consent"—  
 Sufficiency of—Cr. Code 431, 613, 641.

155

**WEIR, R. v. (No. 3).****(QUE.)**

False return by bank official—Evidence of acts con-  
 stituting a higher offence—Swearing the jurors—  
 Irregularity—Right of challenge—Indictment—  
 What amendments allowable—Comment on failure  
 of accused to testify as to immaterial fact—Comment  
 addressed to prisoner's counsel by Crown prosecutor  
 —Canada Evidence Act, s. 4—Bank Act (Can.) ss.  
 85, 99—Cr. Code 667, 723.

262

**WEIR, R. v. (No. 4).****(QUE.)**

Joint indictment—Separate trials—Practice—Option  
 of Crown—Discretion of trial judge to direct separ-  
 ate trial—Grounds for ordering on defendant's  
 application.

351

**WEIR, R. v. (No. 5).****(QUE.)**

Indictment—Defect in substance—Motion to quash  
 —Amendment—Forgery—Uttering document sign-  
 ed by procuration without authority—Allegation of  
 knowledge—Cr. Code 431, 611, 629, 723.

499

**WENTWORTH v. MATHIEU.****(IMP.)**

Temperance Act of 1864 (The Dunkin Act)—Succes-  
 sive complaints—Offences all prior to first complaint  
 —Prosecutor's option to include in one complaint—  
 Limitation of total of penalties—Complaint for  
 single offence not presumed to include prior offences  
 —Construction of statute.

429

**WHITE, Ex PARTE.**

(N.B.)

Information — Canada Temperance Act, R.S.C.  
1886, c. 106 — Insufficiency of information before  
one justice of the peace—Cr. Code 842.

94

**WILLIAMS, R. v.**

(ONT.)

Reserved case on Crown's application—Notice of  
hearing—Service on accused—Practice—Termina-  
tion of solicitor's authority—Cr. Code 743.

9

**WINSLOW, R. v.**

(MAN.)

Stealing from the person—"Pocket picking"—  
Material ingredients of offence to be proved—Appeal  
pursuant to leave—Cr. Code 744, 746.

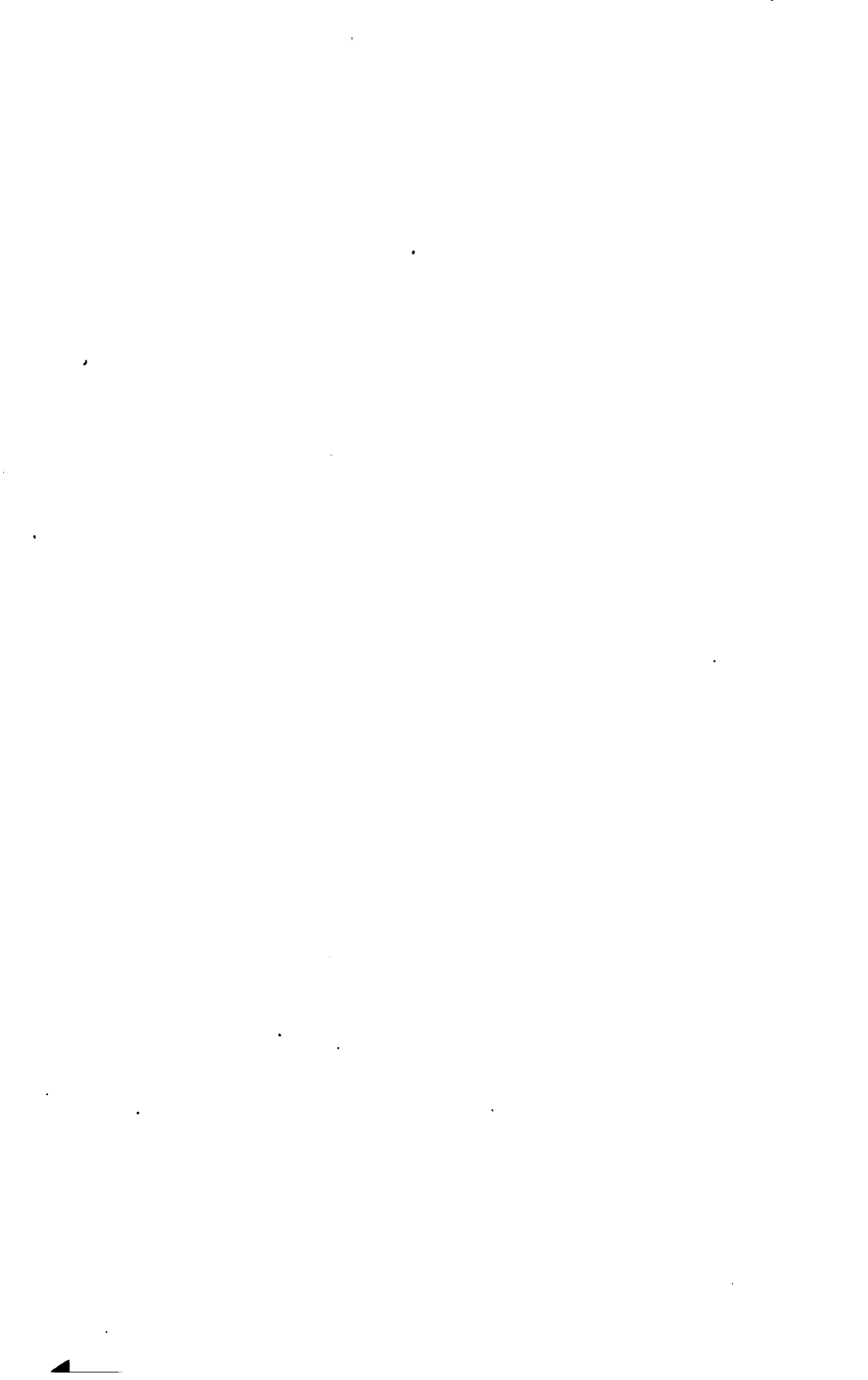
215

**WOODYATT, R. v.**

(ONT.)

Summary conviction—Enforcement after certiorari  
granted—Contempt of court—Magistrate's know-  
ledge of certiorari—Service of writ on Clerk of the  
Peace.

275



## CASES CITED, VOL. III.

- Abgood, R. v., 483  
 Agnew v. Jobson, 149  
 Ah Pow, R. v., 442  
 Aikin, R. v., 396, 507  
 Allen v. Cary, 234  
 Allen v. Flood, 483  
 Allen, R. v., 119  
 Allison, Re, 198  
 Apothecaries v. Nottingham,  
     164, 165  
 Appleton v. Lepper, 146  
 Archambault, Ex p., 15  
 Arthur v. Bokenham, 442  
 Arton, Re, 176  
 Ashley's Case, 142, 143  
 Ashton, R. v., 442  
 Aspinall, R. v., 519  
 Atkinson, R. v., 237  
 Attorney-General v. Crocker, 457  
 Attorney-General v. Kwok-A-  
     Sing, 130  
 Austin, Ex p., 116, 120  
 Aveson v. Kinnaid, 25  
  
 Badger, R. v., 125  
 Bailey v. Harris, 198  
 Bank of England v. Vagliano, 443  
 Bank of N.S.W. v. Piper, 560  
 Barnes, R. v., 360  
 Barnfield, R. v., 438  
 Barton v. Bricknell, 113, 114  
 Baxter v. Carew, 288  
 Beardsall, R. v., 280, 281, 284  
 Bedingfield, R. v., 25  
 Bennett, R. v., 112, 396, 507  
 Benisson v. Jewison, 242, 255  
 Beresford v. Geddes, 394  
 Berry, R. v., 397  
 Best v. Pembroke, 553  
  
 Bingay, R. v., 543  
 Bird v. Gunston, 148  
 Bird v. Ridgely, 225  
 Birmingham Ry., R. v., 516, 517,  
     520, 521  
 Blake v. Beach, 186, 397, 398  
 Blois v. Richards, 393, 507  
 Bond v. Conmee, 146  
 Bontien, R. v., 180, 183  
 Booth v. Clive, 149  
 Borron, R. v., 125  
 Bottoms, R. v., 276  
 Boucher, Re, 14  
 Bowan, R. v., 417, 418  
 Bowman, R. v., 211  
 Bowyer v. Percy, 65  
 Boyle v. Wiseman, 242, 243, 255  
 Brackenbury, R. v., 97, 98, 100  
 Bradford, R. v., 325  
 Bradlaugh, R. v., 354  
 Brady, R. v., 113, 118, 211  
 Bram v. United States, 99  
 Brandt v. Craddock, 147  
 Bray v. Ford, 261  
 Brooke, R. v., 316  
 Bross v. Huber, 148  
 Brown, R. v., 388, 389  
 Budd v. Lucas, 423, 425  
 Bulmer, R. v., 501  
 Burke, R. v., 464, 468, 469, 470, 471  
 Burley, Re, 180  
 Burtress, R. v., 596  
 Butt v. Conant, 144  
  
 Cameron's Circus, Re, 313  
 Cameron, R. v., 108, 501  
 Carden, R. v., 123  
 Carrick on Suir (Justices of), R. v.,  
     397, 507



- Casey v. Smith, 457, 506  
 Catherall, R. v., 114  
 Cathcart v. Hardy, 20  
 Caudle v. Seymour, 149  
 Cavelier, R. v., 586  
 Cave v. Mountain, 149  
 Chamberlain v. King, 148  
 Chambers, R. v., 109  
 Chaney v. Payne, 112, 116, 121  
 Chantrell, R. v., 512  
 Chapman, R. v., 517  
 Charles, R. v., 65  
 Charter v. Greame, 116, 121  
 Chisholm v. Doulton, 560  
 Christie v. Unwin, 313  
 Cinque Ports, R. v., 508  
 Clarke, R. v., 25, 191, 396, 398,  
     507  
 Clark v. Woods, 510  
 Cleave v. Jones, 256  
 Cleworth, R. v., 362  
 Clew, Re, 87  
 Clint, R. v., 207  
 Cobbett v. Kilminster, 221  
 Cobden, R. v., 347  
 Codrington v. Lloyd, 198, 205  
 Colbert v. Kilminster, 225  
 College v. Rose, 165  
 Collins, R. v., 388, 486  
 Commissioners v. Cartman, 66  
 Commonwealth v. Coe, 229  
 Commonwealth v. Culver, 256  
 Commonwealth v. Dugan, 465  
 Commonwealth v. Edwards, 48  
 Com. v. Gray, 242  
 Commonwealth v. Pulaski, 516  
 Com. v. Simpson, 363  
 Commonwealth v. Smyth, 33, 39  
 Commonwealth v. New Bedford,  
     517  
 Conlin, R. v., 591  
 Conlon v. City Ry., 453  
 Connhaye, Re, 176  
 Connolly R. v., 123  
 Conway, Ex p., 187, 510  
 Cook v. Leonard, 148  
 Cooper, R. v., 97, 98, 100, 485  
 Coppen v. Moore, 423, 425  
 Corby, R. v., 270, 514  
 Corfield v. Parsons, 254  
 Cornford v. Carlton Bank, 518  
 Cotteral v. Sweetman, 360  
 Coulson, R. v., 164, 165, 166, 211,  
     437, 438, 595-  
 Courtauld v. Tigh, 464  
 Cox, R. v., 280, 313, 365  
 Creelman, R. v., 313, 316, 321  
 Cremetti v. Crom, 553  
 Crepps v. Durden, 376  
 Creswell v. Jackson, 225  
 Cridland, R. v., 509, 510  
 Crowell, R. v., 538, 596  
 Cummins v. Moore, 149  
 Curtis, R. v., 412  
 Cyr, R. v., 537, 538, 539  
 Daly, Ex p., 67  
 Danaher, Ex p., 311  
 Davies, R. v., 412  
 Day, R. v., 97, 98, 99  
 Dayman, R. v., 126  
 DeMora v. Concha, 198  
 Dias, R. v., 211  
 Dickinson v. Fletcher, 364  
 Dixon, R. v., 442, 486  
 Dixon v. Wells, 150, 151, 186, 193,  
     397, 398  
 Doe v. Davies, 256  
 Doe d. Devine v. Wilson, 228  
 Doe d. Mudd v. Suckermore, 258  
 Doe d. Perry v. Newton, 258  
 Downes, R. v., 543, 546  
 Doyle, R. v., 109  
 Duchess of Kingston's Case, 206  
 Dudley v. Jones, 393  
 Dunn, R. v., 177, 180, 182  
 Dunkley, R. v., 483  
 Durnion, R. v., 388  
 Dwyer v. Esmonde, 92

- Eastern Counties v. Broom, 535  
 Eaton, R. v., 428, 517  
 Edwards, R. v., 25  
 Eli, R. v., 307, 309  
 Elliott, R. v., 115, 211  
 Elwell, R. v., 112  
 Evenwood, R. v., 207  
 Eyre, R. v., 25
- Fairtlough v. Whitmore, 441  
 Faund v. Wallace, 235  
 Fee, R. v., 81, 82  
 Flory, R. v., 512  
 Folley, R. v., 209  
 Forbes v. Smith, 393  
 Ford, R. v., 41, 42, 50  
 Foster, R. v., 25, 555  
 Fowler v. Beebe, 456  
 Fox, R. v., 117  
 France, R. v., 74, 109  
 Francis, R. v., 184  
 Frankland, Re, 553  
 Freakley, R. v., 4, 6  
 Friel v. Ferguson, 146, 149  
 Friel, R. v., 532, 535  
 Friend, R. v., 412
- Gallagher v. People, 3  
 Gallagher, R. v., 355  
 Ganthreaux's Bail, Re, 4, 5, 6  
 Gavin, R. v., 97, 509, 510  
 Geyer v. Aquilar, 198  
 Gibbons, R. v., 486  
 Gibson, R. v., 261, 553  
 Gibson, (James), R. v., 468, 469, 470, 471, 506, 588  
 Gill, R. v., 484  
 Goddard, R. v., 25  
 Goodine, Ex p., 87  
 Graham, R. v., 304  
 Gravel, R. v., 354  
 Gray v. Commissioners, 150  
 Griffin, R. v., 388  
 Griffith v. Taylor, 148
- Griffith v. Williams, 226, 227, 258  
 Great N. of E. Ry., R. v., 517, 521, 525, 526, 531, 533, 535  
 Green v. Burke, 453, 454, 456  
 Green, R. v., 117  
 Gulley, R. v., 326
- Haacke v. Adamson, 376  
 Haldimand Election Case, 280, 282, 283  
 Hall, R. v., 164, 165  
 Hall v. Winkfield, 4  
 Hambly, R. v., 354  
 Hamilton v. Massie, 442  
 Hamilton v. Walker, 343, 350  
 Hankins, R. v., 2  
 Harris, R. v., 216  
 Hartley, R. v., 112, 113, 114, 117, 118, 121  
 Harwich Case, 280  
 Harvey v. Hall, 507  
 Hately v. Merchants' Despatch, 307  
 Haworth v. Brearley, 165  
 Hazen, R. v., 153  
 Hazell, R. v., 198  
 Heath v. Brewer, 148  
 Hellingley, R. v., 115  
 Hermann v. Seneschal, 148  
 Hertton, Re, 165  
 Highan, R. v., 120  
 Hirst, R. v., 101  
 Hodge, R. v., 309  
 Hodgins, R. v., 211, 368  
 Holland, Re, 123  
 Hollingsworth, R. v., 570  
 Hoodless, R. v., 3  
 Hope v. Evered, 390  
 Hopkins, Re, 151  
 Horton, R. v., 153, 539, 596  
 Houghton, Re, 112, 116, 118  
 Howard v. Gosset, 198, 204  
 Howarth, R. v., 164, 165, 166, 437, 438  
 Hughes, R. v., 146, 150, 151, 186, 193, 194, 288, 396, 398, 399

- Humphrey, R. v., 442  
 Hurlbert, R. v., 197  
  
 Ingrey, R. v., 305  
 International, R. v., 527  
 Ivens, R. v., 366  
  
 Jackson v. Leggett, 239  
 Jackson, R. v., 101, 355  
 J'Anson v. Stuart, 557  
 Jarvis, R. v., 341  
 Jenks v. Turpin, 441, 445  
 Jerrett, R. v., 355  
 Johnson v. Com., 363  
 Johnson, R. v., 97, 388, 396, 507  
 Jones v. Gooday, 148  
 Jones, R. v., 483  
 Jones v. Williams, 112, 376  
 Jukes, R. v., 20  
 Justices of Carrick, R. v., 397  
 Justices of Salop, R. v., 395  
  
 Kelly v. Sherlock, 93  
 Kennedy, R. v., 235, 238, 376  
 Kensington v. Inglis, 258  
 Kent v. Dover, 464  
 Keyser v. McKissan, 456  
 King v. Harrison, 204  
 King v. Owen, 466  
 Koenig v. Ritchie, 92  
  
 Labrie, R. v., 352  
 Lansing v. Van Alstyne, 239  
 Lapierre, R. v., 534  
 Lascelles v. State, 184  
 Lawrence, R. v., 466, 468, 469,  
     470, 471  
 Lazier, Re, 419  
 Lea v. Charrington, 390  
 Learmont, R. v., 116  
 Leary v. Patrick, 149  
 Leblanc, R. v., 3  
 Lee, R. v., 326  
 Lee, Re, 177  
  
 Leonards, R. v., 388  
 Levy v. Duncombe, 507  
 Lewis, Ex p., 125  
 Lillyman, R. v., 25, 26, 27, 298, 299,  
     300, 305  
 Little, R. v., 25  
 Littlechild, R. v., 353  
 Lloyd, R. v., 259  
 Lockett, R. v., 184  
 Long, R. v., 347  
 Longton Gas, R. v., 517  
 Lyon, R. v., 486  
 Lyon's Case, 364  
  
 McConohy, R. v., 353  
 McDonald, (John), R. v., 373  
 McDonald, R. v., 388  
 McFarlane, R. v., 385  
 McGuinness v. Dafeo, 194  
 McIntyre, R. v., 550  
 McLinehy, R. v., 356  
 McKenzie, R. v., 116  
 McLennan v. McKinnon, 116, 120  
 McMahon, R. v., 25  
 McMillan, R. v., 190, 398  
 McNamara, R. v., 558  
 Makin v. N.S.W., 223  
 Malcolm v. Parry, 281  
 Male, R. v., 97, 98, 100  
 Maltby, Re, 150  
 Manchester Ry., R. v., 16, 19, 509  
 Manchester, (Mayor) v. Williams, 516  
 Mansell v. R., 273  
 Martin, R. v., 181  
 Massey v. Morris, 560  
 Mason, R. v., 191, 360  
 Mayor v. Smith, 361  
 Medley, R. v., 65  
 Megson, R. v., 25  
 Menary, R. v., 507, 509, 513  
 Met. Omnibus v. Hawkins, 516, 526  
 Mill v. Hawker, 67  
 Millard, R. v., 288  
 Miller, R. v., 97, 98, 99  
 Monaghan, R. v., 208

- Moor v. Roberts, 316  
 Moore v. United States, 229  
 Morby, R. v., 543  
 Morgan, Ex p, 394  
 Morgan, R. v., 100, 227  
 Morley v. French, 39  
 Morley, R. v., 412  
 Morris v. People, 457  
 Morrison v. Harmer, 93  
 Morse v. James, 204  
 Morse, R. v., 375  
 Morton, R. v., 180  
 Mosier, R. v., 553  
 Mullins v. Surrey, 363  
 Munoz, R. v., 360  
 Munslow, R. v., 109  
 Murphy v. Halpin, 92  
 Murphy, R. v., 237  
 Murphy, Re, 174, 177, 181  
 Murray v. Judah, 239  
 Murray v. Nelson, 65  
 Murray, R. v., 586  
  
 Nan-e quis-a Ka, R. v., 330, 331  
 Nasmith, R. v., 412, 543  
 Neil v. McMillan, 149  
 Nevill v. Fine Arts, 517  
 Newland, R. v., 483  
 Nicholas, R. v., 25  
 Northcote v. Brunker, 211  
 North Durham Case, 280, 281  
 Northowram, R. v., 543  
 Norton v. Miller, 149  
 Nunn, R. v., 386  
 Nurse, R. v., 81, 82  
  
 O'Connell v. The Queen, 35, 37, 46  
 Odger v. Mortimer, 92  
 O'Donoghue v. Hussey, 92  
 O'Gorman v. Westhaver, 313  
 Ormes v. Beadel, 376  
 Orr, R. v., 325, 398  
 Osborne, R. v., 25  
 Owen, R. v., 466  
 Over, R. v., 117  
  
 Palmer's Case, 360  
 Paris v. Levy, 93  
 Parmiter v. Coupland, 93  
 Parsons v. Lloyd, 204  
 Parton v. Williams, 148  
 Patten v. Rhymer, 442  
 Paul, R. v., 4, 6  
 Payne, R. v., 355  
 Paynter, R. v., 125  
 Peacock, R. v., 180, 184  
 People v. Braman, 483  
 People v. Collins, 456  
 People v. Hopson, 455  
 People v. Stevens, 456  
 People v. White, 456  
 Petersky, R. v., 386  
 Pharmaceutical v. London, 516, 521,  
     525, 527, 528  
 Phillips v. Biron, 204  
 Philpot, R. v., 412  
 Plunkett, Re, 115, 120  
 Pocock, R. v., 517  
 Poitvin, Re, 14  
 Portsmouth v. Smith, 361  
 Prestidge v. Woodman, 148  
 Pullbrook, Ex p., 313  
  
 Queen, The, v. — (Indexed under  
     name of defendant)  
  
 Raby, R. v., 92  
 Ramsey, R. v., 388  
 Ramsey, Re, 321  
 Rastall v. Att'y-General, 2  
 Ray, R. v., 556  
 Regina v. — (Indexed under name  
     of defendant)  
 Reid v. McWhinnie, 198  
 Rice, R. v., 115, 557  
 Richards, R. v., 483  
 Richardson v. Newcombe, 229  
 Riddle v. County of Bedford, 456  
 Ridpath, R. v., 4, 6  
 Riley, R. v., 326  
 Ritchie, R. v., 3, 5, 7, 8

- Roberts v. Orchard, 148  
 Robinson v. Canadian Pacific, 526  
 Robinson, R. v., 117, 418, 484, 485  
 Rockwood's Case, 42  
 Roe, R. v., 396, 507  
 Rogers v. Hawken, 99  
 Rogier, R. v., 442  
 Rood, R. v., 400  
 Rose, R. v., 101  
 Ross, Ex p., 16, 19  
 Rush, R. v., 26, 27  
 Russell, R. v., 399  
  
 St. Albans, R. v., 4  
 St. Louis, R. v., 313  
 Salop, (Justices of), R. v., 395  
 Salter, R. v., 388  
 Sandeman v. Beach, 362  
 Sanderson, R. v., 510  
 Savacool v. Boughton, 203  
 Scatton, R. v., 186  
 Scotten, R. v., 397, 398  
 Selmes v. Judge, 148  
 Selwood v. Mount, 121  
 Seymour v. Butterworth, 93  
 Shaw, R. v., 186, 194, 395, 398,  
 441, 507  
 Shepherd v. Postmaster-General,  
 191, 394, 398  
 Sheppard, R. v., 184  
 Silverlock, R. v., 222  
 Simpson, R. v., 119  
 Sinden v. Brown, 141, 147, 149  
 Skingley v. Surridge, 510  
 Slattery, R. v., 65  
 Sleeth v. Hurlbert, 15, 388  
 Smith v. Hopper, 148  
 Smith v. Nebraska, 3  
 Smith, R. v., 113, 412, 466, 543, 588  
 Solita v. Yarrow, 226, 228, 258  
 Somers, R. v. 362  
 Somersset v. Wade, 560  
 Sonier, Ex p., 151, 194, 398  
 South Hetton v. News, 94  
  
 Sowell v. Champion, 234, 238  
 Spalding v. Alford, 258  
 Sprague, Ex p., 95, 388  
 Sproule, Re, 14, 314, 321, 388  
 Sprung v. Anderson, 376  
 Starcy v. Chilworth, 517  
 Starkey, R. v., 111, 115, 116  
 State v. Burgess, 42  
 State v. Carroll, 453  
 State v. First Nat. Bank, 517  
 State v. Freeman, 41  
 State v. Hooker, 453, 455, 466  
 State v. Hopton, 465  
 State v. Howley, 3  
 State v. Munson, 211  
 State v. Passaic, 518  
 State v. Wilkinson, 48  
 Stewart, R. v., 164, 165  
 Stone, R. v., 396  
 Storness v. Lake, 396, 507  
 Stowe v. Querner, 242, 245  
 Strauss, R. v., 386  
 Surrey (Justices of), R. v., 510  
 Sweeton v. Collier, 313  
 Sydserrff, R. v., 4, 5  
  
 Talbot's Bail, Re, 3, 196  
 Taylor v. Clemson, 396  
 Taylor v. Nesfield, 147  
 Taylor v. Skrine, 456  
 Telegram Newsp. Co. v. Com., 517  
 Theriault, R. v., 216  
 Thomas, R. v., 517  
 Thompson, R. v., 97, 100, 101  
 Thornhill, R. v., 555  
 Thornton, R. v., 2, 97  
 Thorpe v. Priestnall, 388, 391  
 Tomlinson, R. v., 483, 484  
 Townsend, R. v., 587  
 Toole, R. v., 97  
 Toronto Ry. Co., R. v., 517, 525, 527  
 Trepanier, Re, 14, 553  
 Trimble v. Hill, 361  
 Truax v. Dixon, 198

- Turnbull, R. v., 86, 87, 88  
Turner v. P.M.G., 191, 394, 398  
Tyler, R. v., 527  
Tynemouth, R. v., 85, 87  
  
United Kingdom, R. v., 517  
Union Steamship v. Melbourne, 528  
United States v. John Kelso Co.,  
517  
United States v. Mitchell, 180  
United States v. Wood, 465  
Usill v. Hales, 149  
  
Vahey, R. v., 564, 566  
Van Boven's Case, 397  
Veley, R. v., 92  
Venning v. Steadman, 149  
Viau, R. v., 98  
  
Walker v. Curtis, 242  
Walker, R. v., 297  
Wallace, R. v., 211  
Walsh, R. v., 114, 211  
Walton v. R., 483  
Ward v. The State, 211  
Watson, R. v., 237  
Webster's Case, 41  
Weir, R. v., (No. 1) 262, 525, 529,  
534  
  
Weir, Re, 176  
Weldon v. Johnson, 93  
Weller v. Toke, 148  
Welstead v. Levy, 245  
Wheeler, R. v., 5, 7  
Whitbread, R. v., 19  
White, Ex p., 388  
White v. Hill, 234  
Whitfield v. South Eastern, 535  
Whyte, R. v., 180, 183  
Wick, R. v., 207  
Wilcox v. Smith, 457  
Williams v. Quebrada Ry., 280  
Wilson (Carus) Case, 553  
Wilson v. Graybiel, 116  
Wink, R. v., 25  
Winsor, R. v., 354  
Wood, R. v., 25, 297  
Woodward v. Ball, 164  
Wooley v. Clark, 205  
Wotten, R. v., 327  
Wright v. Doe d. Tatham, 257  
Wyse, R. v., 564, 566  
  
Yates v. The Queen, 388  
Yeatman, Ex p., 394  
Yeoveley, R. v., 4  
Young, R. v., 325  
Younger, R. v., 364, 365

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CORRIGENDA.

Page 499, head-line 2, for "prosecution" read "procuration."



# Canadian Criminal Cases.

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Reports of Cases [in Criminal and Quasi-Criminal matters decided in the Courts of Canada and of the Provinces thereof.

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[COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE KILLAM, C.J., BAIN AND RICHARDS, JJ.

**THE QUEEN v. ALEXANDER HAMILTON.**

*Bail—Reserved Case—Admission to bail pending decision—  
Recognizance to appear 'for sentence'—Order for new  
trial—Estreat of recognizance—Motion to set aside roll  
—Cr. Code 743 (5), 746 (3), 914, 916.*

1. Where on a trial upon an indictment a verdict of guilty was returned, but a reserved case was granted upon a question of law, and the accused admitted to bail, the condition of the recognizance taken being that the accused would appear at the next sittings of the Court 'to receive sentence,' the condition of the recognizance is not broken if the accused fails to appear after judgment is given on the reserved case quashing the conviction and ordering a new trial.
2. The conviction having been set aside, the accused was entitled to presume that he would not be called for sentence, and the sureties were not bound for his appearance for any other purpose than to receive sentence.
3. A roll of estreated recognizance and a writ of fieri facias against the sureties thereon will in such a case be set aside on motion to the Full Court.

ARGUED : May 12, 1899.

DECIDED : June 23, 1899.

Application to set aside a roll of estreated recognizance and a writ of fieri facias issued thereon.



One Alexander Hamilton was convicted of a criminal offence at a sitting of the Court for the trial of criminal matters in the Western Judicial District; but, a case being reserved upon a point of law arising at the trial, he was released on bail. The condition of the recognizance was that Hamilton would appear at the next sitting of the Court for the trial of criminal matters for that district to receive sentence. After the hearing of the reserved case the Full Court quashed the conviction and ordered a new trial. At the next following sitting for the trial of criminal matters for the Western Judicial District, Hamilton was called, but failed to appear, and the Clerk of the Court entered his recognizance upon a roll as forfeited, and proceedings were taken which resulted in the issue of a writ of fieri facias against the cognizors.

WINNIPEG, May 12, 1899.

*H. M. Howell, Q.C.*, for defendants: As to the history of bail and mainprize, see Hale's P. C., vol. 1, p. 124. Under section 914 of The Criminal Code, 1892, the original sureties, if there were any, were bound for the prisoner's appearance for sentence. Prisoner was bailed under section 743. Estreat was merely extracting the bond or record from the court in which it was filed or given, and sending it to the Exchequer Court to be proceeded upon: *Rastall v. Atty. Gen.*, 18 Grant (Ont.) 149; *Rex v. Hankins*, McCl. & Y. 29. All proceedings to enforce an estreat were taken in the Exchequer Court; *Rex v. Thompson*, 3 Tyrw. 53. By section 916 the roll of forfeited recognizances shall be made up by the clerk and sent to the Prothonotary. For the origin of sections 916, 917 and 918, see Con. Stat. Can., c. 99, ss. 120-1, and C.S.U.C., c. 117, ss. 1-5. Section 919 is explained by a comparison of the statutes of Canada and Upper Canada. The language, "may forbear to order the recognizance to be estreated," in section 919 involves the conclusion that an order is required for the estreat in any case. The last part of section 919 implies that the Judge

has already ordered an estreat of the recognizance. The roll here was made out without the Judge's order for the estreat. Then there was a direction that it be proceeded with, which was just the contrary of what the statute provided for. The evidence shows that there was no order forfeiting the recognizance. The Consolidated Statutes originated from 7 Geo. 4, c. 64, s. 31. A recognizance may be taken by parol, but must be recorded before it can be acted on. The record does not state a debt; *Reg. v. Hoodless*, 45 U.C.R. 556. The condition was to appear to receive sentence, without stating for what. The jurisdiction must appear on the face. The obligation is strictly construed: *Reg. v. Ritchie*, 1 C.L.J.N.S. 272; *State of Maine v. Howley*, 73 Me. 553; *Reg. v. Leblanc*, 8 Leg. News, 114, cited in 4 Crim. Law. Mag., 775; *Gallagher v. People*, 91 Ill. 590. The Court had no jurisdiction to sentence the prisoner. There is a release of sureties by the arrest of the accused: *Smith v. Nebraska*, 11 N.W.R. 317. The writ was not delivered to the proper sheriff, there being no sheriff of a county here. There is no right to seize lands. This motion is also made under section 922 of the Code. Sureties should be deemed to have supposed under the circumstances of this case that they were not bound to produce the principal.

*W. E. Perdue* for the Crown: There is no necessity for an order for the estreat of the bail in question. Section 918 of The Criminal Code refers only to recognizances mentioned in section 917; *Re Talbot's Bail*, 23 Ont. R. 65. Even if an order from a judge were required, the fiat upon the back of the roll signed by Mr. Justice Dubuc is sufficient. The deputy clerk of the Crown and Pleas at Brandon was the proper officer to receive the roll under section 916, s-s. 2. The recognizance is sufficient. The recognizance referred to in *Reg. v. Hoodless*, 45 U.C.R. 556, was taken before justices, and was not a recognizance taken in open court. The word "recognizance" in the entry in the book of the clerk of assize implies all that is necessary, and shows that the sureties acknowledged themselves to owe Her Majesty the

amount mentioned, subject to the defeasance mentioned : Burns' J. P., vol. 5, p. 70. Such a memorandum as was entered by the clerk in his book is a sufficient record ; it is the fact of the cognizors appearing in court and acknowledging their indebtedness to the Crown that constitutes the obligation. The mere entry of the matter is only for the purpose of preserving evidence of the fact : *Hall v. Winkfield*, Hob. 195 ; *Reg. v. Justices of St. Albans*, 8 A. & E. 932 ; *Reg. v. Inhabitants of Yeoveley*, 8 A. & E. 806 ; *Reg. v. Sydserrff*, 9 Jur. 280. The recognizance was entered into to secure the attendance of the defendant after the special case had been argued under section 743. The indictment in the case showed the crime with which he was charged ; the cognizors were fully aware of the purpose for which the recognizance was entered into, and they are bound to produce the defendant at the next Assizes to receive sentence. The recognizance does not say whether it is to receive sentence pursuant to the verdict already rendered, or to a verdict that may be rendered upon a second trial. The parties to it are bound by the strict letter of the recognizance ; *Reg. v. Ridpath*, 10 Mod. 152 ; *Reg. v. Freakley*, 6 Cox C.C. 75 ; *Rex v. Paul*, 6 C. & P. 323. As to what excuses a compliance with recognizance, see Tidd's Pr., vol. 1, pp. 289-296 ; *Re Gauthreaux's Bail*, 9 Ont. Pr. 31. It is necessary for the applicants to show that the conviction was set aside. The order of the Full Court setting aside the conviction and ordering a new trial must be certified under the hand of the presiding Chief Justice, or senior puisne Judge, under section 746, s-s. 3, and this has not been done. The undertaking in the present case to produce the defendant for sentence involves a greater liability upon the part of the sureties than to produce the defendant for trial. The expression "county" in section 916, s-s. 4, means what corresponds to a county in Manitoba : see Criminal Code, s. 3, s-s. (f). As to relieving the sureties and generally as to recognizances see Burns' J. P. "Fines," vol. 2 ; Viner's Abr., vol. 18, pp. 163-166 ; Hawkins P. C., vol. 3, p. 238.

*H. M. Howell, Q.C.*, in reply : We do not dispute the law laid down in *Reg. v. Sydeserff*, 9 Jur. 280, but in that case there was a record. A recognizance is an obligation of record. The Court must take the record as it is. In *Gauthreaux's Case*, 9 Ont. Pr. 31, the recital was read to interpret a condition. English cases cited as to releasing bail went on the ground of want of power now given by the Code. The Crown has taken out an order quashing the conviction which must be taken as effecting that result. Sections 744-6 apply only when a Judge has refused to reserve a case. Tidd's Pr. shows that a recognizance will not be enforced when the condition is rendered impossible by act of law.

WINNIPEG, June 23, 1899.

KILLAM, C.J.—

The main question for determination is whether, the purpose of Hamilton's attendance having failed, his bail were bound for his appearance

In *The Queen v. Wheeler* (1865), 1 C.L.J.N.S. 272, where a party charged with assault with intent to commit rape was released on bail to appear at the next sittings of Assize and plead to such indictment as might be found by the grand jury in respect of the charge, and the only bill found was for rape, it was held by the Court of Queen's Bench for Upper Canada that the recognizance was not forfeited by his non-appearance.

And, in *The Queen v. Ritchie* (1865), 1 C.L.J.N.S. 272, where the condition of a recognizance was that a party would appear and surrender himself and plead to such indictment as might be found against him by the grand jury, and no indictment was found, the same Court held that his non-appearance constituted no breach of the recognizance. In the latter case it was distinctly argued that he was bound to appear and surrender at all events, but the Court would not so interpret the obligation. The judgment was delivered in each case by Hagarty, J., whose opinion upon a matter

of this kind should not be lightly dissented from. No authority for a contrary view is found.

In *Rex v. Paul*, 6 C. & P. 323, and *Reg. v. Freakley*, 6 Cox C.C. 75, there were merely applications to discharge recognizances on suggestions that there would be no prosecutions.

In *Re Gauthreaux's Bail*, 9 Ont. Pr. 31, the question was merely one of construction of the recognizance, and whether it was for the appearance of the accused to plead to an indictment already found or one to be found. If the party was considered bound to appear, at all events, this question would not have been of importance.

In *The Queen v. Ridpath*, 10 Mod. 152, the statement is that a recognizance bound a party to appear *ad respondendum*, etc., the Court considered that this was *ad respondendum* generally, and extended to all crimes, and that if it had relation to a particular crime this should have been mentioned in the recognizance. The latter case appears rather to favor the contention of the applicants.

An order of the Court quashing the conviction and directing a new trial was taken out, but apparently no certificate of the order or direction was given by the Chief Justice or senior Judge pursuant to section 746, sub-section 3, of The Criminal Code. Whether the order itself was before the Court when Hamilton failed to appear, we are not informed.

However, as it is clear that the conviction had been set aside, he could not properly have been sentenced. The proceedings were all taken and the conviction set aside in the same Court. The accused and his sureties were, I think, entitled to presume that all proper steps would be taken, and that the accused would not be called for sentence.

Without considering any of the other points raised, I would make the rule absolute to set aside the proceedings.

BAIN, J.—

I agree that the application should be allowed. The condition of the recognizance that the sureties entered into

was that Hamilton would appear at the next sittings of the Court to receive sentence; but, as the conviction was afterwards set aside, he was not required to appear, nor was he called for sentence. To say that he was bound to appear at all events, or for any other purpose than to receive sentence, would be to change the condition of the recognizance, and to hold the sureties to an undertaking substantially different from the one they entered into. The cases of *Reg. v. Wheeler* (1865), 1 C.L.J.N.S. 272, and *Reg. v. Ritchie* (1865), 1 C.L.J.N.S. 272, are authorities that this cannot be done.

RICHARDS, J., concurred.

*Rule absolute to set aside  
the proceedings.*

**Note :** *Recognisance of bail—Form of condition—Estreat.*

In *The Queen v. Wheeler* (1865), 1 Can. Law Jour. 272, the recognizance was conditioned as follows: "The condition of the above recognizance is such that, whereas the said William Wheeler was charged before James Smith, Esq., and other justices then present, for that he, the said William Wheeler, within six months past, did assault Emily Wilson with intent to commit rape upon the said Emily Wilson; if, therefore, the said William Wheeler will appear at the next Court of Assize and Nisi Prius and General Gaol Delivery, to be holden in and for the County of Kent, and plead to such indictment as may be found against him by the Grand Jury for and in respect of the charge aforesaid, and take his trial upon the same, and not depart the court without leave, then the said recognizance to be void, or else to remain in full force and virtue."

The bill found by the grand jury was for rape, and it was for non-appearance to the bill so found that the recognizance was estreated. The only point argued upon the motion to set aside the writ of *feri facias* issued thereon was that as to the difference between the recognizance and the bill found, and

**Note—Continued.**

the effect thereof on the obligation of the bail. The judgment of the Court of Queen's Bench for Upper Canada (Hagarty, J., and Morrison, J.) was as follows :

“We think this estreat cannot be sustained. The condition of the recognizance was for the appearance of the accused to such indictment as should be found against him for an assault on Emily Wilson with intent to commit rape ; but the bill found was for the more serious offence of rape. Bail might well be content to become bail for the appearance of the accused to answer the lesser charge, and yet refuse to become so on a charge more grave. They did not become bail for the appearance of the accused to answer a charge of rape, and his non-appearance to answer that charge was no breach of the recognizance. The rule must be made absolute for the relief of the bail.”

In *The Queen v. Ritchie* (1865), 1 Can. Law Jour. 272, 273, the condition of the recognizance was as follows : “The condition of the within written recognizance is such that, “whereas the said Joshua Ritchie was this day charged “before, &c., for that, &c.; if, therefore, the said Joshua “Ritchie will appear at next Court of Oyer and Terminer, “&c., to be holden, &c., and there surrender himself into “the custody of the keeper of the common gaol there, and “plead to such indictment as may be found against him by “the grand jury for and in respect of the charge aforesaid, “and take his trial upon the same, and not depart the said “court without leave, then the recognizance to be void, &c.”

The witness for the prosecution not appearing, the grand jury had no opportunity of finding a bill ; but the accused, notwithstanding, was called, and not appearing his recognizance was estreated. Counsel for the Crown (Mr. Harrison), in showing cause to a rule nisi to set aside the estreat, argued that the condition of the recognizance was not simply to appear if a bill were found, but absolutely to appear at the court and there surrender himself, and (in the event of a bill being found) plead to such indictment, &c.

**Note—Continued.**

Hagarty, J., delivered the following judgment, Morrison, J., concurring therein :

“ I am aware the construction for which Mr. Harrison contends has prevailed in some counties ; and I think, looking at the object of the recognizance and the reason of the law, that his criticism of the words of the recognizance is too sharp. I do not think it was intended by the Legislature that the accused should appear and surrender himself unless a bill were found. The estreat of the recognizance here was therefore premature. The rule must be made absolute for the relief of bail.”

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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J.Q.B., FALCONBRIDGE AND STREET, JJ.,  
SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

**THE QUEEN v. WILLIAMS.**

*Reserved case on Crown's application—Notice of hearing—  
Service on accused—Practice—Termination of solicitor's  
authority—Cr. Code 743.*

1. Notice of an application by the Crown for a new trial, and of the hearing of a case reserved on the Crown's application where the accused has been acquitted at the trial, should be served upon the accused personally.
2. The authority of the solicitor acting for the accused in the trial proceedings is prima facie to be presumed to have terminated upon the latter's acquittal ; and proof of service upon the solicitor is insufficient in the absence of evidence rebutting such presumption.

DECIDED : September 17, 1897.

The defendant Williams was charged with manslaughter and acquitted ; but the Crown sought to obtain a new trial and obtained a reserved case upon the question as to whether the depositions of the accused at the coroner's inquest were admissible against him, the trial judge having rejected the same.



A copy of the case and notice of hearing had been served upon the solicitor retained by the defendant for the trial and had been placed on the list for hearing.

*J. R. Cartwright*, Q.C., for the Crown.

No one for the accused.

TORONTO, September 17, 1897.

THE COURT held that the solicitor's authority would *prima facie* be terminated upon the defendant's discharge from custody on his acquittal; that there is in such case no cause pending which the Appellate Court can hear, unless a new trial is moved for and notice duly served; and as no one appeared for the defendant, the case was directed to stand over until notice of the application for a new trial should be served personally upon the defendant.

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[SUPREME COURT OF CANADA.]

BEFORE GIROUARD, J., IN CHAMBERS.

**Ex parte MACDONALD.**

*Jurisdiction—Supreme Court of Canada—Habeas corpus—  
Judicial notice of local territorial divisions—Warrant of  
commitment—Stating locality where offence committed.*

1. The jurisdiction of a judge of the Supreme Court of Canada in matters of habeas corpus in any criminal case under any Statute of Canada is limited to an inquiry into the cause of commitment as disclosed by the warrant of commitment.
2. The courts will take judicial notice of the local divisions, such as counties, municipalities and polling sections, into which their country is divided for purposes of political government.

ARGUED : December 29, 1896.

DECIDED : December 31, 1896.

Application for a writ of habeas corpus to inquire into the cause of commitment of the petitioner James W. Macdonald,

upon the ground that the jurisdiction of the committing magistrate did not sufficiently appear upon the face of the warrant.

The material facts presented to the judge on the application are mentioned in the judgment.

*Owen Ritchie*, for petitioner ex parte.

OTTAWA, December 31, 1896.

GIROUARD, J.—

On the 2nd of November, 1896, the petitioner was committed to the common jail in the County of Pictou, in the Province of Nova Scotia, under a warrant signed under seal by “James Roy, stipendiary magistrate for the municipality of Pictou.”

The warrant of commitment contains among others, the following allegations: “Whereas James W. Macdonald, of Hopewell, in the County of Pictou, was on the eighth day of September in the year of our Lord one thousand eight hundred and ninety-six, at the town of New Glasgow, in the County of Pictou, duly convicted before the undersigned James Roy, a stipendiary magistrate for the municipality of the County of Pictou, for that he the said James W. Macdonald, between the first day of June last past and the thirty-first day of August, in the year of our Lord one thousand eight hundred and ninety-six, at Hopewell, in the County of Pictou, unlawfully did sell intoxicating liquor contrary to the provisions of the second part of the Canada Temperance Act then in force in the said County of Pictou.”

The petitioner contends that the said warrant is defective upon its face, inasmuch as it does not appear that “Hopewell in the County of Pictou” was in the municipality of the County of Pictou. He makes the following statement in the affidavit which is filed before me:

“The Province of Nova Scotia at the time of the making both of the said conviction and warrant of commitment was,

and now is, composed of eighteen counties, of which the County of Pictou is and was one, and at the time of the making of the said conviction and warrant and of the taking of the said information on which they are founded, the said County of Pictou was, and now is, composed and made up of the municipality of the County of Pictou, incorporated under chapter 3 of the Acts of the Legislature of the Province of Nova Scotia for the year 1895 and four incorporated towns existing in law and governed by the Towns Incorporation Act, 1895. The said municipality of the County of Pictou is not now and never was territorially or otherwise co-extensive with the said County of Pictou, but is territorially less than the said County of Pictou and was so at the time of the making of the said conviction and warrant aforesaid. The municipality of the County of Pictou at the time of the making of the said conviction and warrant aforesaid comprised and now comprises that portion of the said County of Pictou, other than the four incorporated towns aforesaid, which said four incorporated towns with the said municipality of the County of Pictou now and at the time of the making of the said conviction and warrant of commitment, made up that geographical division of Nova Scotia known as the County of Pictou."

For this reason (and others which were not urged before me) the petitioner made an application to the Honourable Mr. Justice Graham, one of the justices of the Supreme Court of Nova Scotia, for his discharge from imprisonment under a writ of habeas corpus (R.S. N.S. 4th ser., ch. 99, sec. 3) but the learned judge refused to discharge him.

The petitioner then renewed his application to the Supreme Court of Nova Scotia sitting in banc, (McDonald, C.J., Weatherbe, Townshend and Henry, JJ.), but that honorable court also refused unanimously to discharge him.

Mr. Justice Townshend delivered the opinion of the court. He said :

"The offence for which he was convicted is stated to have been committed at Hopewell, in the County of Pictou. It is

contended that this warrant does not show as it should on its face jurisdiction in the committing magistrate. By Acts of 1895 (N.S.), c. 89, sec. 1, "The municipality of the County of Pictou is hereby created a police division." Roy was duly appointed stipendiary magistrate for this police division. If Hopewell is within it, jurisdiction is shown. By ch. 3, sec. 1, Acts of 1895 (N.S.), the municipality of the County of Pictou is defined to be what at that time was known as the County of Pictou. Although not very clearly expressed, this section—read with other parts of the Act—in my opinion indicates that the area of the original county is designated as the area of the municipality of the county. This is made clear by section 2 which cuts out of this area all cities or incorporated towns and proceeds to define the term "county" as that part of the county or district within the territorial jurisdiction of the county council. The warrant describes "Hopewell" as in the County of Pictou. The question is whether that necessarily means the municipality of the County of Pictou, or may it with equal reason be read as in some of the incorporated towns, or one of the incorporated towns. It was pointed out that in the schedule to the Act Hopewell in Pictou County is described as polling section No. 17, entitled to return to the Municipal Council of the municipality of Pictou two councillors. We know from other portions of the same Act that no locality can return councillors except it be part of the municipality, and this in itself seems a conclusive reason for saying that Hopewell is within the police division, and therefore within the jurisdiction of the stipendiary magistrate of the municipality of the County of Pictou."

The petitioner has filed before me a copy of the warrant of commitment and also of the conviction and information filed before the stipendiary magistrate, and other papers, but I must say I am not inclined to go into any inquiry behind the warrant of commitment.

I am not disposed to go beyond what appears to me to be the plain words of the Supreme Court Act and the well

settled jurisdiction of this court ; *Re Boucher* (1879) Cassels' Digest (2nd ed.) 325 ; *Re Poitvin* (1881) Cassels' Digest (2nd ed.) 327 ; *Re Trépanier* (1885) 12 Can. S.C.R. 111 ; *Re Sproule* (1886) 12 Can. S.C.R. 140.

The first paragraph of section 32 of the Supreme and Exchequer Courts Act, sec. 32, provides as follows :

“ Every judge of the court shall have concurrent jurisdiction with the courts or judges of the several provinces, to issue writs of habeas corpus ad subjiciendum, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.”

I believe therefore that the jurisdiction of a judge of the Supreme Court in matters of habeas corpus in any criminal case, is limited to an inquiry into the cause of commitment, that is, as disclosed by the warrant of commitment, under any Act of the Parliament of Canada.

The question then is whether the warrant of commitment discloses jurisdiction on the part of the stipendiary magistrate. The counsel for the petitioner has referred me to Paley on Summary Convictions, 7th ed., and other authorities, to establish that jurisdiction must appear upon the face of the warrant, and especially as to the locality where the offence is alleged to have been committed. But the learned counsel has forgotten to quote from Paley at page 196 which shows that the court will take judicial notice of the general division of the kingdom into counties.

This is the rule laid down by all the judges of the Supreme Court of Nova Scotia, and I believe it expresses the law not only of that province but of the whole Dominion. Mr. Justice Townshend has most appropriately referred to Taylor on Evidence, sec. 15 :

“ Courts also notice the territorial extent of the jurisdiction and sovereignty exercised de facto by their own government and the local divisions of their country, such as states, provinces, counties, counties of cities, cities, towns, parishes and the like, so far as political government is concerned or affected, but not the relative position of such local divisions,

nor their precise boundaries further than may be prescribed in public statutes."

The same principle was upheld by Mr. Justice Ramsay of the Quebec Court of Appeals in 1880 in a case very much similar to the present one, *Ex parte Archambault*, 3 Legal News, 50. See also *Sleeth v. Hurlburt*, 25 Can. S.C.R. 620.

I am therefore of opinion that the application should be rejected, and it is rejected. I have the satisfaction of knowing that the petitioner is not without recourse. He may appeal to the full court under the second paragraph of sec. 32 of the Supreme and Exchequer Courts Act.

*Writ of habeas corpus refused.*

[COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE KILLAM, C.J., DUBUC AND BAIN, JJ.

THE QUEEN v. HERRELL (No. 2.)

*Liquor License—Exception of sales by registered druggist—  
Evidence—Proof of registration—Alternative right of  
appeal—Discretion to refuse certiorari—Manitoba Liquor  
License Act—Manitoba Pharmaceutical Act.*

1. Where the defence to a summary prosecution for selling liquor without a license is that the accused was entitled to do so under a statutory exception respecting registered druggists, and by statute the onus is expressly cast on the accused to prove himself within the exception, and provision made for proving the register by the production of a printed copy thereof, the *viva voce* testimony of the accused that he is a duly registered druggist is not competent evidence of the fact, and the magistrate may disregard the same, although no objection was taken to the admission of such testimony,
2. *Per* DUBUC, J.—Where there is a right of appeal from a summary conviction, and it appears upon an application for a certiorari to bring up the conviction to be quashed that the ground alleged therefor is more properly the subject of an appeal, the discretion of the Court should be exercised by refusing the certiorari.

ARGUED: May 3, 1899.

DECIDED: June 13, 1899.

This was an application for a writ of certiorari to bring

up a conviction made by a police magistrate for selling liquor without the license therefor required by The Liquor License Act, R.S.M., c. 90.

While a number of objections were stated, the only substantial one was that the accused was a registered druggist under The Pharmaceutical Act, R.S.M., c. 116, who, by virtue of section 149 of The Liquor License Act, was entitled to sell intoxicating liquors under certain conditions, and that he should have been charged and convicted, if at all, only for a breach of those conditions.

*George Patterson* for the magistrate showed cause : The issue of a writ of certiorari is a matter of discretion ; *Reg. v. Manchester, &c., Ry. Co.*, 8 A. & E. 413 ; *Ex parte Ross*, 1 Can. Crim. Cas. 153. Section 147 of the Act stands by itself unqualified. Section 149 merely makes an exception enabling a duly qualified druggist selling according to it to escape punishment if he proves the facts ; *Clark's Magistrate's Manual* 191 ; *Crim. Code*, s. 890 ; *Liquor License Act*, R.S.M., c. 90, ss. 182, 197. It is not shown that Herrell came within section 149. Nor did the evidence before the justice of the peace show it. Herrell only stated he was a druggist duly registered. He should have shown he was registered as such under The Pharmaceutical Act. He should have proved it by the production of the register and proof of it and of his identity, or by a certificate as provided by section 38 of The Pharmaceutical Act.

*R. L. Ashbaugh* for applicant : The information, summons, evidence and conviction all describe defendant as a druggist. In the evidence he is continually referred to as a druggist. The magistrate treated him as such throughout. There was no objection taken to Herrell's evidence of registration and there was no contradiction of it. A druggist duly registered has a right to sell liquor without a license, which was the charge here. Having a right to sell liquor without a license, it was no offence for the defendant to do so. The form in Schedule K to the Act shows the Legislature regarded a sale contrary to section 149 as a distinct offence. The penalty

is different : see section 165. In the case of selling without a license, quantity is immaterial. The question of quantity could not arise on that charge. See section 123 as to wholesale selling. The evidence for the prosecution shows the purchase was made from a druggist, doing business as such and at his store. The statute 61 Vic. (Man.) c. 28, s. 4, gives a heavy penalty for a second sale by a druggist, contrary to the Act.

KILLAM, C.J.—

The principal objection taken in this case, if otherwise valid, appears to me to fail, on the ground that there was no evidence under which we can hold the magistrate to have been bound to find that the accused was registered as a druggist under The Pharmaceutical Act. Section 147 of The Liquor License Act expressly prohibits the sale of liquor without a license. There was distinct evidence which, if believed, justified the finding that the accused did sell intoxicating liquor. Section 149 provides that section 147 shall not prevent a chemist or druggist, duly registered as such under and by virtue of the Act or Acts relating to the Pharmaceutical Association of Manitoba, from selling liquor in accordance with certain specific conditions. Under section 182, the informant was not bound to negative this exemption, but the onus was on the accused to show that he came within it.

The information described the accused as a druggist, and some of the evidence for the prosecution appears to show that the accused was in some way carrying on business as such. The accused, giving evidence on his own behalf before the magistrate, stated that he was a druggist "duly registered." No other proof of registration was given before the magistrate. Under The Pharmaceutical Act, R.S.M., c. 116, registration consists of an entry in a register kept by the registrar of the Pharmaceutical Association. Section 38 of this Act provides a method of proving such entries by a certified copy of the register or by a certificate of the registrar in certain cases.



No such evidence was adduced to the magistrate, and it did not appear that the accused had ever seen the register. The magistrate refused to believe the evidence of the accused that he did not make the sale charged, and it was certainly within his jurisdiction to refuse to believe such attempted proof of registration. It is only a registered chemist or druggist who is entitled to the exemption ; and, if the magistrate was not satisfied with the proof of registration, it was within his jurisdiction to find it not proved and to convict of the offence charged.

The rule should be discharged with costs.

DUBUC, J.—

The accused was charged and convicted before a magistrate of selling liquor without a license, under section 147 of The Liquor License Act, R.S.M., c. 90. He now applies for a writ of certiorari to bring up the conviction for the purpose of having it quashed. The defence does not deny that liquor was sold by the accused on the occasion referred to in the conviction. The principal ground urged on behalf of the accused is that he was at the time a duly registered druggist, and that, as such, he was authorized to sell liquor under section 149 of The Liquor License Act. He may, or he may not, have been a duly licensed and registered druggist at the time the offence is shown to have been committed, but the onus was on him to prove that he was. He gave evidence on his own behalf and swore that he was a duly licensed druggist ; but that cannot be considered as sufficient evidence of that fact.

Section 38 of The Pharmaceutical Act, R.S.M., c. 116, provides that a register of the names of all persons entitled to be pharmaceutical chemists or druggists under the provisions of the Act shall from time to time be printed and published under the direction of the council of the Pharmaceutical Association of the Province of Manitoba, and that a copy of such register shall be *prima facie* evidence in all courts and before all justices of the peace and others, that

the persons therein specified are registered according to the provisions of the Act. Such was the evidence required to prove that the accused was a duly licensed druggist, unless the fact was admitted by the Crown prosecutor, or otherwise satisfactorily proven. The accused failed to adduce any such evidence, or to show such admission.

It is contended on behalf of the applicant that the magistrate, at the trial, dealt with and treated the accused as a druggist, but that cannot be considered sufficient. In order to be entitled to the benefit of the provisions of section 149 of The Liquor License Act, respecting the sale of liquor by druggists under certain conditions, he had to show not only that he was a druggist, but that he was a duly licensed and registered druggist; and, to establish that fact, there was only his own statement which the magistrate must have considered insufficient, because he convicted him. In most offences prosecuted before magistrates, it is incumbent on the prosecution to negative in the information, evidence and conviction, all exceptions or exemptions by which the party charged might be excused or exonerated; but, under sections 182 and 197 of The Liquor License Act, this is declared not to be necessary in offences under the Act; and it is for the accused to show that he comes within any of the exceptions or exemptions therein provided.

The granting of certiorari is generally considered as a matter in the discretion of the Court: *The Queen v. The Manchester and Leeds Ry. Co.*, 8 A. & E. 413. The Court, in the exercise of its discretion, will refuse to grant it if, upon the affidavits in support of the application, it appears that the ground alleged for it is more properly the subject of appeal: per Lord Mansfield, in *Reg. v. Whitbread*, 2 Doug. 550.

In *Ex parte Ross*, 1 Can. Crim. Cas. 153, it was held by the Supreme Court of Nova Scotia that where a statute makes provision for an appeal from a summary conviction, the discretion of the Court as to granting a certiorari should

be exercised by refusing the latter, unless special circumstances are shown therefor. In this case, provisions for appeal against the conviction are found in section 220 and following sections of The Liquor License Act. Under these circumstances, and on the fact that the accused has failed to adduce proper evidence to satisfy the magistrate that he was a duly licensed druggist, I think the writ of certiorari should not be granted, and the rule should be discharged with costs.

BAIN, J.—

I agree in thinking that the rule for a writ of certiorari should be refused.

Of the several grounds stated in the rule nisi, the only one that Mr. Ashbaugh relied on was the 5th :—that the said Herrell being a duly registered druggist under The Pharmaceutical Act is not subject to the provisions of The Liquor License Act, s. 149.

The conviction is under section 147, which provides that no person shall sell any liquor without having first obtained a license under the Act ; and section 197 makes it incumbent on the defendant in any prosecution under the Act to prove that he is duly licensed. Section 147 contains no other exemptions or qualifications, and the special provisions referring to the sale of liquor by druggists for medicinal purposes are contained in a subsequent section, 149. These provisions do not alter or modify section 147, but provide for the sale of liquor by a certain class of persons under special conditions ; and, apart from the express provisions of section 182, it has long been settled that when the exceptions come by way of proviso in a separate clause or section from that which describes the offence and without being incorporated therewith, the defendant must bring himself by proof within the proviso by which he seeks to protect himself : Paley on Convictions, pp. 130, 244 ; *Cathcart v. Hardy*, 2 M. & S. 534 ; *Rex. v. Jukes*, 8 T.R. 542.

The provisions of section 147 are of general application ; and, whether the defendant is a registered druggist or not,

it was quite competent for the complainant to charge him under that section ; and if the provisions of the Act relating to druggists would have afforded the defendant any defence on the charge that was made, the onus lay on him to bring himself within these provisions by proving that he was a duly registered chemist or druggist.

The only evidence there is that is relied on as affording such proof is the statement of the defendant that he is a duly registered druggist. But section 149 applies only to druggists duly registered under The Pharmaceutical Act ; and a reference to this Act shows that the register of the Association is in writing. The contents of the register should have been proved, therefore, either by the primary evidence of the register itself, or by secondary evidence in the manner provided for in section 38 of the Pharmaceutical Act. The verbal statement that the defendant was duly registered was no proper or competent evidence of the fact in question, and the magistrate was quite justified in disregarding it.

*Rule discharged with costs.*

## HIGH COURT OF JUSTICE, ONTARIO.

BEFORE THE HONORABLE JOHN ALEXANDER BOYD, CHANCELLOR,  
AND THE HONORABLE MR. JUSTICE ROBERTSON,  
SITTING AS A COURT OF APPEAL FOR  
CROWN CASES RESERVED.

## THE QUEEN v. GRAHAM.

*Rape—Evidence—Statement of complainant after offence—  
Time and opportunity for complaint—Verdict of indecent  
assault—Cr. Code 259, 267.*

1. Upon a charge of rape, statements made by the complainant to a police officer on the day after the offence was alleged to have been committed and in response to his enquiries, the complainant having on the day of the offence complained to others of an assault but not of rape, are not admissible in evidence either as part of the *res gestæ* or as in corroboration.
2. If on an indictment for rape the jury acquit the accused of that offence but find him guilty of indecent assault, the verdict should stand notwithstanding the improper admission in evidence of statements so made by the complainant after the alleged offence, if the other evidence in the case is ample to warrant the verdict of indecent assault.

ARGUED: June 16, 1899.

DECIDED: June 22, 1899.

Crown case reserved.

The prisoners were tried before ROBERTSON, J., and a jury on May 19th, 1899, at Toronto, on an indictment for rape, under sec. 266 of the Criminal Code of Canada, the offence being alleged to have been committed upon Emily Calder, on February 18th, 1899.

A verdict was returned of "not guilty" of rape but "guilty" of indecent assault.

The following case was reserved by the learned trial judge for the opinion of a Court of Criminal Appeal.

"The evidence of the complainant, Emily Calder, was to the effect that on the forenoon of the 18th February, 1899,

while going through a lane from Gildersleeve place to Spruce street, in the city of Toronto, she was attacked by several men, the three prisoners being positively identified by her ; that she was seized and dragged into a place off the lane and knocked down, and that the men in question pulled her clothes up over her knees and ravished her, and she became unconscious. On cross-examination she admitted that she could not say positively whether or not connection was actually had with her by any or all of the young men, as she had become unconscious, but her private parts had been sore for some days after. She stated that she cried out as loud as she could, and when she came to her senses she was assisted by two women, Mrs. Johnston and Mrs. Thompson. She stated to them that she had been knocked down by some boys in the lane and that they had pulled her clothes up to her knees, but in her dazed condition she did not complain to Mrs. Johnson and Mrs. Thompson that she had been ravished, nor did they hear any cries for help. They brushed the ashes off her clothes, and her son, George Calder, came and took her home. George Calder swore that he saw the three prisoners running away as he came into the lane. She did not complain to her son or to her husband that she had been ravished, giving as her reason that her husband was a man of violent temper and she was afraid to tell him. Mrs. Calder walked home and washed her dishes, but remained in the house and suffered from her injuries for two days ; no doctor was called in. The same evening, the 18th of February, Robert Armstrong, an inspector in the city police force, received a complaint from Mrs. Johnson and Mrs. Thompson that Mrs. Calder had been assaulted in the lane in question. Inspector Armstrong called upon the complainant at her home in the forenoon of the 19th of February, about half-past ten, when she complained to him that she had been criminally assaulted in the lane in question, and mentioned the names of the three prisoners as the men who had assaulted her. In reply to the direct questions of Inspector Armstrong, ' Had they any connection with you, Mrs. Calder ? ' she said, ' Yes.' She further said she had shouted, and stated how they

(naming the three prisoners) had kept their hands upon her mouth and that each one had relieved the other according as the turn came.

“Mr. Robinette, for the prisoners, contended the statements so made by the complainant to Inspector Armstrong, on the forenoon after the assault, were not properly admissible as evidence against the prisoners, they not being present, and should have been rejected. I decided to receive the evidence in view of the following: The woman's statement was that she was knocked senseless; she did not know and could not know what was going on, so she said; and she may not have sufficiently recovered, and not being a very strong woman intellectually, she might not have known, and there might have been a sort of fear in her mind to tell two women who were strangers to her what had taken place; but after considering the whole thing over night, and the police officer coming, she might then have come to a conclusion as to what had taken place. As she said, they must have done that because she felt sore at certain parts, and she had received a blow over the head.

“The jury found the prisoners not guilty of the charge of rape, but found them all guilty of indecent assault. There was evidence upon which the jury might find the verdict of indecent assault apart altogether from the evidence of Inspector Armstrong.

“At the request of counsel for the prisoners, I have reserved for the consideration of a Divisional Court of the High Court of Justice the following question: Was I right in admitting the evidence of Police Inspector Armstrong as to the above particulars of the complaint and statements made by Emily Calder to him on the forenoon of Sunday, the 19th day of February, A.D., 1899?”

TORONTO, June 16, 1899.

*T. C. Robinette* and *J. M. Godfrey* for the prisoners: The evidence was inadmissible, as the statements were not made immediately after the alleged offence; if they had been made

then and there to the two women, they would be within *Regina v. Lillyman* (1896) 2 Q.B. 167, but they were not made till the following day, and were no part of the *res gestæ*. The first person met is the proper person to whom to make such complaints: *Regina v. Eyre* (1860), 2 F. & F. 579; *Regina v. Wood* (1877), 14 Cox 46; *Regina v. Little* (1883), 15 Cox 319; *Regina v. Megson* (1840), 9 C. & P. 420; *Regina v. Osborne* (1842), C. & M. 622; *Rex v. Clarke* (1817), 2 Stark, N. P. 241; *Regina v. Nicholas* (1846), 2 C. & K. 246; *Rex v. Wink* (1834), 6 C. & P. 397; *Rex v. Foster* (1834), 6 C. & P. 325; *Aveson v. Lord Kinnaird* (1805), 6 East 188, 193; *Regina v. Bedingfield* (1879), 14 Cox, 341; *Regina v. McMahon* (1889), 18 Ont.R. 502; *Regina v. Goddard* (1882), 15 Cox 7; *Regina v. Edwards* (1872), 12 Cox 230; Roscoe's Criminal Evidence, 12 ed. p. 22.

*J. R. Cartwright, Q.C.*, for the Crown: The question was whether, under all the circumstances, it was reasonable for the woman to defer the complaint as she did; she was not confined to one complaint; though no part of the *res gestæ*, the evidence was admissible to confirm the prosecution, on the cases cited above.

TORONTO, June 22, 1899.

BOYD, C.—

*Regina v. Lillyman* (1896), 2 Q.B. 167, decides that evidence may be given not only that a complaint was made by a woman whose chastity had been assailed, but also that the particulars of the complaint may be stated. In that case it was on the same day and very shortly after the commission of the offence that complaint was made.

Here complaint was made on the same day, but more fully afterwards on the next day, when a police inspector, having heard of the matter, called upon the prosecutrix. I should be disposed to reject this later statement as incompetent. Too great a time had elapsed, and it was not uttered as the unstudied outcome of the feelings of the woman and



as speedily after the occasion as could reasonably be expected. It would not have been uttered at all (presumably) if the officer had not gone to the woman with "expectation in his eye" or interrogation on his countenance. A similar lapse of time was held a sufficient reason for excluding the details by Mr. Justice Wright in *Regina v. Rush*, 60 J. P. 777, (decided after *Regina v. Lillyman*) in October, 1896.

I would answer the question submitted in the negative; but there is not enough before us to show that an improper result was reached in the jury convicting the prisoners of indecent assault.

ROBERTSON, J.—

After due consideration, I am of opinion that the evidence objected to was not properly received on the charge of rape, which was the case presented, and it is clear that the jury did not give to it any consideration; but the case reserved admits, as settled by the counsel for the Crown and the counsel for the prisoners, and, as I think, properly, that there was ample evidence to warrant the jury in finding the prisoners guilty of an indecent assault. That verdict should stand, but the question put by the case should be answered in the negative.

*Conviction affirmed.*

**Note:** *Rape and similar offences—Evidence of complaint made soon afterwards—Admissibility—Practice on tendering such evidence—Judge's charge.*

In *R. v. Lillyman* (1896), 2 Q.B. 167, 60 J.P. 536, it was held by the Court (Russell, C.J., Pollock, B., Hawkins, Cave and Wills, JJ.), upon a Crown case reserved, that in cases of indecent assault and rape, and similar charges, not only the fact that the prosecutrix made a complaint soon after the occurrence, but the details of the complaint itself, are admissible in evidence, not as proof of the facts complained of, but to show that her conduct at the time was consistent with her story in the witness box and as negating consent. Hawkins, J., in delivering the judgment of the

**Note—Continued.**

Court, said: "The general usage has been to limit the evidence of the complaint to proof that the woman made a complaint of something done to her, and that she mentioned in connection with it the name of a particular person. . . . After very careful consideration, we have arrived at the conclusion that we are bound by no authority to support the existing usage of limiting evidence of a complaint to the bare fact that a complaint was made, and that reason and good sense are against our doing so. . . . It has been sometimes urged that to admit the particulars of the complaint would be calculated to prejudice the interests of the accused, and that the jury would be apt to treat the complaint as evidence of the facts complained of. Of course, if it were so left to the jury, they would naturally so treat it. But it never could be legally so left, and we think it is the duty of the judge to *impress upon the jury* that they are not entitled to use the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated. With such a direction, we think the interests of an innocent accused would be better protected than they are under the present usage; for, when the whole statement is laid before the jury, they are less likely to draw wrong inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint against the accused."

In *R. v. Rush* (1896), 60 J.P. 777, the prisoner was indicted for carnally knowing a girl under the age of thirteen years. The day after the commission of the alleged offence the girl's mother questioned her, and the girl, in the absence of the prisoner, made a statement in answer. It was proposed to give the particulars of the statement in evidence on behalf of the prosecution on the authority of *Reg. v. Lillyman* (1896), 2 Q.B. 167, 60 J.P. 536. Mr. Justice Wright, presiding at the Central Criminal Court, said that the lapse of time between the committing of the offence and the making of the statement was important in these cases; that,

**Note—Continued.**

when counsel proposed to open upon and put in evidence such statements, the judge's attention should first be called to the time that had elapsed between the occurrence and the making of the statement, in order that the judge might be enabled to say whether or not the lapse of time would be an objection to the admissibility of the statement. In *Rush's* case the statement had not been made immediately after the alleged offence was committed, and the trial judge therefore refused to allow evidence of the particulars of the statement to be given.

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, J., TOWNSHEND, J., GRAHAM, E.J.,  
MEAGHER AND HENRY, JJ.

## THE QUEEN v. TOWNSEND.

*Indictment—Written consent of Attorney-General to prefer—  
Requisites of—Grand Jury—Initialing names of witnesses  
—Foreman's signature endorsed on bill of indictment—  
Omission of words "true bill"—Nova Scotia practice—  
Cr. Code 641, 645, 760.*

1. Where the preferring of an indictment is authorized solely upon the ground that a direction of the Attorney-General has been given therefor (Cr. Code 641), the written consent or direction must be one with regard to the particular case, and the offence must be specified therein; and a general direction in writing by the Attorney-General authorizing counsel to take charge of the criminal prosecutions for the Crown at the sittings of the court will not suffice.
2. Cr. Code, sec. 645, which enacts that the foreman, or some member of the grand jury acting for him, shall initial on the bill of indictment the name of each witness sworn and examined, and which requires that the name of every witness examined, or intended to be examined, shall be endorsed on the bill, is directory only; and the omission to so initial does not invalidate the indictment.
3. The provisions of Cr. Code, sec. 760, directing that in Nova Scotia (Halifax excepted) an indictment shall not be made out until the grand jury so directs, make it unnecessary in that Province (Halifax excepted) that the words "true bill" as well as the signature of the foreman of the grand jury should be endorsed upon a bill of indictment; and the endorsement of the words "indictment for an assault, etc.," shortly describing the offence, and followed by the foreman's signature, is sufficient.

ARGUED : January 31, 1896.

DECIDED : May 18, 1896.

This was a Crown Case reserved. At the June term of the Supreme Court for Kings County, opening at Kentville on the fourth day of June, A.D. 1895, before Weatherbe, J., the defendants, William H. Townsend and Alfred Whiting, were tried for assaulting a constable, one James M. Towe, while in the discharge of his duty. In this case there had

been no preliminary examination of the defendant Townsend, but only of the defendant Whiting, and no person bound over to prosecute the defendant Townsend, but, on the evidence in the depositions, the trial judge thought Townsend also was liable, and told the jury, in charging them, that it was their duty to find a bill against Townsend as well as Whiting.

The Attorney-General was not present, nor did he prosecute or prefer the indictment or authorize or direct anyone to do so, but the prosecution was conducted by Mr. H. H. Wickwire, barrister, who presented a general written authority from the Attorney-General under sec. 4, cap. 7, Statutes of N.S. for 1887, to conduct the criminal prosecutions for Kings County.

One question reserved was whether this was a sufficient authority for preferring the said indictment, or whether it should have been quashed against one or both of the defendants. The judge refused to quash, on motion, for this alleged defect.

The indictment was indorsed as follows:—

*In the Supreme Court, 1895.*

The Queen v. William H. Townsend and Alfred Whiting.

“Indictment for an assault on peace officer, and for resisting and preventing apprehension and detainer.

(Sgd.) F. E. PALMER,

*Foreman Grand Jury.*”

The words “true bill” did not appear indorsed on the indictment. The grand jury had, previously to their bringing in the indictment with this indorsement, come into court and stated that they had found a bill against both defendants. A motion was made to quash the indictment against both defendants, on the ground of the absence of these words, and that the bill did not purport to have been found until it had been so indorsed. The judge thought the words not necessary, and refused to quash, though, having some doubt, he reserved the question.

The second question was whether the indictment should have been quashed on the ground of the absence, as above

mentioned, of the words "true bill." The names of six witnesses were indorsed on the indictment when brought into court, none of whom were sworn in open court. There were no initials, or name of the foreman, or any grand juror written against the name of any such witnesses.

Another question was whether such absence was ground of quashing the indictment. The learned trial judge held the statute was directory. The defendants refused to plead, and he directed a plea of "not guilty," and they were both convicted.

HALIFAX, January 31, 1896.

*W. E. Roscoe*, Q.C., for the Crown.

*H. Mellish*, for defendant.

HALIFAX, May 18, 1896.

TOWNSHEND, J.—

The learned judge has reserved three questions for the consideration of the court. I propose to deal at present with the second as the most important; that is to say, whether the defendant was lawfully tried and convicted, owing to the words "true bill" not being indorsed on the indictment. The report states as follows:

"The words 'true bill' did not appear indorsed on the indictment. The grand jury had, previously to their bringing in the indictment, with this indorsement, come into court, and stated that they had found a true bill against both defendants. A motion was made to quash the indictment, on the ground of the absence of these words, and that the bill did not purport to have been found until it had been so indorsed. I thought the words not necessary, and refused to quash, though, having some doubt, I reserved the question. The defendants refused to plead, and I directed a plea of 'not guilty,' and they were both convicted."

This objection, although in one sense touching only a matter of form, is yet, in my opinion, a very substantial one in the due administration of the criminal law. The records

of the court should, on their face, show that all the safeguards which the common law has thrown around the accused have been strictly complied with. So far as I have been able to discover, it has been the ancient, and invariable rule, that every indictment should, when found, have indorsed on it the words "a true bill," and be signed by the foreman of the grand jury, as the proper and authentic record of the fact, that the grand jury had, before them, sufficient evidence to put the accused on his trial for the offence charged therein. That which was termed a bill of indictment before, becomes, on the finding of the jury, evidenced by these words, the indictment, and the words "a true bill" form part of that indictment, on which the prisoner is to be tried. From the many authorities, all to the same effect, on this subject, I shall cite from one only, Chitty's Criminal Law, which distinctly sets it forth with the reasons:

"But, at the present day," says the author, "the indorsement is in English absolutely; if found 'a true bill,' and if rejected 'not a true bill,' or, which is the better way, 'not found,' in which case the party is discharged without further answer. The indorsement, 'a true bill,' made upon the bill becomes part of the indictment, and renders it a complete accusation against the prisoner. When the jury have made their indorsement on the bills, they bring them publicly into court, and the clerk of the peace at sessions, or the clerk of assize on circuit, calls all the jurymen by name, who severally answer, to signify that they are present, and then the clerk of the peace or assize asks the jury whether they have agreed upon any bills, and has then to present them to the court, and then the foreman of the jury hands the indictments to the clerk of the peace or assize, who asks them if they agree the court shall amend matter of form, altering no matter of substance, to which they signify their assent. This form is necessary to enable the court to alter any clerical mistake, because they have no authority to change the form of the accusation without the assent of the accusers. After this is done, the clerk of the peace reads over the names of

the offenders and offences in every indictment, and whether the bill be found or thrown out *as indorsed by the grand jury*, and makes a private mark or cross upon those which are rejected, and usually files the bill, though this is not necessary." Chitty's Criminal Law, 324 ; Story on the Constitution, sec. 1784 ; 4 Black Crim. 302-3 ; Archbold, Crim. Prac. 98-99.

More is not necessary to show what the law and practice is in England. In the United States similar questions have arisen, and, although the course of decisions in the various States has not been uniform, the learned judges who pronounced contrary views seem to concede the law in England to have been as above stated. In *Commonwealth v. Smyth*, 11 Cushing (Mass.) 473, the same objection was made ; and in a very learned judgment Merrick, J., discusses the whole law on the subject. He says :

"This position seems to be well warranted by the decisions chiefly relied on by the defendant's counsel of English courts, and, if such an objection were made in those courts, it would undoubtedly be sustained. For there it is held that these words are not only indispensable to make a complete and valid legal accusation, but that, when indorsed upon a bill, they become incorporated with and make a material part of its allegations."

He then proceeds to explain the reasons why the same rule is not absolutely necessary in Massachusetts, although generally followed ; that is to say, shortly, because the bills of indictment are prepared beforehand and sent before the grand jury, which are returned into court, endorsed with the words "a true bill" or "not found."

He continues :

"In Massachusetts, no formal bills are ever previously prepared to be preferred before them, as in the English practice ; but they receive and act upon all complaints which any individual may think fit to submit to them, and determine in what cases accusations shall be made. In these decisions



they always act for the Commonwealth and never for a private prosecutor."

He concludes with the statement :

"The reason upon which they are elsewhere held to be essential does not exist in our practice and mode of procedure, and therefore this omission in an indictment is simply the omission of a form which, if oftentimes found convenient and useful, is in reality immaterial and unimportant."

It is argued that like reasons exist in this province for dispensing with this indorsement, which all authorities agree is necessary in England. The practice and procedure in our courts, following the English common law, has always required it to be made, and nothing, except a statute, can change a material requirement of this kind.

It is contended that sec. 760 of the Code has this effect. It provides that

"In the Province of Nova Scotia a calendar of the criminal cases shall be sent by the clerk of the Crown to the grand jury in each term, together with the depositions taken in each case, and the names of the different witnesses, and the indictments shall not be made out, except in Halifax, until the grand jury so directs."

In Halifax, certainly, the law remains as it was. Has it been changed as regards other parts of the province, and, if so, why? I cannot positively say why a different rule was applied outside Halifax. It has been said that it was passed to check a growing evil on the part of the crown prosecutors of drawing up often unnecessary bills, which were thrown out by the grand jurors, while the provincial treasury was called on to pay for them. Whether this be the true explanation or not, it is clear no change was made in the ancient procedure which made the indorsation of these words, signed by the foreman, a necessary and material part of the indictment. If it was so held to be material, it will not do to argue that it is no longer necessary, because of the provision in the Code, already cited, which, by no construction which can be applied to it, abolishes their use. The reasons for

having such a record of the finding of the grand jury remain as strong as ever they were, and I can see nothing to warrant us in deciding they may be dispensed with, any more than we might assume authority to dispense with some other form of procedure in criminal trials.

I shall not deal particularly with the other questions reserved, as some of my brethren have gone fully into them. I may, however, briefly state that in my opinion the omission of the foreman's initials against the names of the witnesses does not vitiate the indictment, as the provision is merely directory. There is good authority for this view in *O'Connell v. The Queen*, 11 Cl. & F. 252.

I have some doubts as to whether there was sufficient authority for preferring this indictment; but in the view I have adopted on the first point, it is unnecessary for me to give any decided opinion.

GRAHAM, E. J.—

This case is reserved in respect to three matters.

(1) The indictment has not the initials of any member of the grand jury written opposite to the names of the witnesses.

(2) The indictment was indorsed as follows :—

*In the Supreme Court, 1895.*

The Queen v. William H. Townsend and Alfred Whiting.

“Indictment for an assault on peace officer and for resisting and preventing apprehension and detainer.

(Sgd.) F. E. PALMER,

*Foreman Grand Jury.*”

But there was not written upon it the expression, “true bill.”

(3) In the case of Townsend, while the learned judge, of his own motion, directed the grand jury that it was their duty to find a bill as against him as well as against Whiting, it is contended that no one was lawfully authorized to prefer a bill as against him, under section 641 of the Code. It is to be inferred that in Whiting's case someone had been bound over to prosecute, as there had been a preliminary inquiry.

In the Criminal Code we find the following provision, s. 760:

“In the Province of Nova Scotia a calendar of the criminal cases shall be sent by the clerk of the Crown to the grand jury in each term, together with the depositions taken in each case and the names of the different witnesses, and the indictments shall not be made out (except in Halifax) until the grand jury so directs.”

Contrast this with the English practice as described in 1 Stephen's History of the Criminal Law, 274. Before any witnesses are examined by the grand jury, they are furnished by the clerk of the Crown, with the calendar, the depositions and the names of the witnesses. In England they are furnished by the prosecutor with a bill of indictment, with the names of the witnesses indorsed thereon. That is the meaning of the section corresponding to section 645. And then, in both places the witnesses are sent before the grand jury. The jurors learn the charge and the names of the witnesses—in the one case from the calendar, depositions and the list of witnesses, and in the other from the bill and the indorsement of the witnesses' names. Now this section applicable to Nova Scotia, which requires the clerk to send to the grand jury the names of the witnesses, does not permit him to furnish them indorsed on a bill of indictment. He cannot do so, for there is then none drawn up. There is no bill of indictment; therefore, section 645 applies to other parts of Canada not specially provided for, as a portion of the Province of Nova Scotia is. If the part of it relating to the initials does apply, then, I think, the initials may be put opposite to the names on the list which corresponds to the indorsement on the English bills. For aught that appears here, this may have been done.

But the English reason fails. Construe section 645 as applicable to this province. In England the names, being on the bill merely to indicate the witnesses to be examined, then, when the indictment stage is reached, there ought to be something to show who of them had been sworn and

examined. So that the provision requires the initials to be written opposite to the names of those sworn and examined, instead of having the names rewritten. Here, where there is no list indorsed on a bill, why should there be initials? You may indorse the names of those who have been examined upon the indictment, but why should there be initials also? The list itself would only be a list of those who had been sworn and examined—there could not be any then to be examined. I wish to guard myself against expressing any opinion upon these provisions in their application to Halifax and other parts of Canada. Mr. Justice Taschereau's book has been in use for a long time. He has cited authority to show that the provision as to initials is mandatory, and it has not been challenged. I defer to this view he evidently holds. It is thought to be settled by the House of Lords; but one has only to read the two Acts relating to grand juries in Ireland, and carefully read the opinion of Tindal, L.C.J., in *O'Connell v. The Queen*, 11 Cl. & F. 252, to see that the reasoning is not necessarily applicable to section 645. By the statute relating to Ireland, the foreman of the grand jury or other juror was required by the Act to administer the oath and to indorse the names upon the bill. The former Act requiring the oath to be administered in open court had been repealed, so that it could be presumed that the witness had been sworn by the grand jury. The name was found indorsed thereon. In Canada, the oath may be administered in open court or before the grand jury. The names are not indorsed on the bill by the foreman, and there is no presumption that the oath was administered by the grand jury. It may have been assumed by them that the witness had already been sworn in open court. This will explain what Tindal, L.C.J., says :

“ The oath must have been already administered (which is the essential part of the enactment) before, in the language of the statute, ‘the foreman, who shall have administered the oath,’ is directed to state the names of the witnesses sworn, and to authenticate the same by his signature or initials ; that is, before the objection above made can

possibly arise. As a matter of convenience, at the trial, in order to ascertain at a glance whether the witness examined before the crown jury was one of those who appeared before the grand jury, such direction ought undoubtedly to have been complied with ; but it cannot be law that, after the witness has been duly sworn and examined, and the bill returned a true bill upon his evidence, it can be deprived of its legal operation and character by reason of the foreman of the grand jury having neglected to comply with such directions of the statute."

I think, if authority was required, that what Tindal, L.C.J., said would apply to the provision applicable to Nova Scotia, namely, section 760, which more closely resembles the provisions of the Act relating to grand juries in Ireland than the sections of the Code applicable to other portions of Canada.

2. Then it is said that the indictment was bad because, although the foreman signed it under the indorsement "indictment," the expression, "a true bill," was not indorsed above the signature.

Here, again, the English reason fails, and the provision of the Code applicable to Nova Scotia, to which I have referred, to the effect that the indictment shall not be made out, except in Halifax, until the grand jury directs, makes a different practice. In short, there is no such thing here as "not a true bill."

In England, the signature of the foreman on the back of the bill would not indicate whether it was a "true bill" or "no bill." In Nova Scotia it can only indicate a true bill, because there is none to be drawn up under the law until the grand jury order it. True, they might change their minds after their order, in an exceptional case ; but then they would not present the draft indictment indorsed "not found." The provision of the law contemplates no such presentment. But even if an accident should happen, and a discarded draft indictment should come into court, there are the same checks against accident in the mode of presentment,

the formula and the records, which exist in England, where a mistake in the indorsement might be made.

The case reserved contains this statement :

“The grand jury had, previously to their bringing in the indictment with this indorsement, come into court, and stated that they had found a bill against both defendants. Having made this presentment, drawing up the indictment was merely clerical work.”

But there is authority in Massachusetts, in point, where a similar practice prevails. In *Morley v. French*, 2 Cush. (Mass.) 139, Metcalf, J., said :

“By the English practice, a bill of indictment is put into proper form by the prosecutor or on his behalf, and is preferred without oath to the grand jury, who examine witnesses and return a true bill or ignoramus. . . . But in this commonwealth the grand jury first examine witnesses on oath, *and then* order or refuse to order a bill to be drawn up.”

The case of *Commonwealth v. Smythe*, 11 Cush. (Mass.) 473, was decided in respect to an indictment signed by the foreman, but not indorsed with the words, “true bill.” The learned judge admitted what Bishop, in his work on Criminal Procedure, sec. 141, note 6, does not concede, namely, that in England the indictment would be quashed, and he states the English practice. He says :

“Before any complaint charging a party with the commission of a criminal offence can be submitted to that body there, for their consideration, it must be duly set forth and described in a bill, properly prepared and fairly engrossed on parchment. When its members have been regularly assembled, and have been sworn, charged and empowered to exercise the duties of their office, all the bills which have been previously prepared in that manner are placed in their possession; and they then proceed to hear and consider the evidence adduced by the several prosecutors in support of their respective accusations, and thereupon to determine, in

respect to each particular bill, whether it shall be found or rejected. As soon as their investigations are completed, and their decision in each case made, they carry and return into court, and publicly deliver into the hands of the proper officer all the bills they have received, including those they have rejected, as well as such as they have found to be true. And in order that the two classes may always thereafter conclusively be distinguished, the one from the other, they are required to indorse the words, "a true bill," upon those which they have found, and the words "not found" upon all which they have rejected. The indorsement of the former converts the bill from a simple complaint into a complete formal and effectual indictment."

"But our practice and course of proceeding in the prosecution of public crimes and offences, after the preliminary inquiry and action of a grand jury, are widely different, and involve no necessity for any similar indorsement or mark of discrimination, after these several presentments. It has undoubtedly been usual in this Commonwealth to insert the words "a true bill" at the foot of the indictment, above the signature of the foreman of the grand jury; but it may be questioned whether this form has been invariably observed. And no case has been cited or referred to in which it has been decided in our courts that the inscription of these words upon any part of the bill is indispensable to its validity." . . .

Again, he says:

"No formal bills are ever previously prepared to be preferred before them, as in the English practice; but they receive and act upon all complaints which any individual may think fit to submit to them, and determine in what cases accusations shall be made. In these decisions, they always act for the Commonwealth and never for a private prosecutor. Bills of indictment are drawn up by the attorney for the Government *under their direction* and in conformity to their decisions. They return these, and no other bills whatever, into court, and they are the only presentments made upon

which parties charged with the commission of criminal offences are arraigned for trial. The bills of indictment so returned are received by the court as official accusations of the grand jury, and placed upon its files and made part of its record. When, in addition to this course of proceeding, the indictment is verified by the signature of the foreman of the grand jury, and bears upon its face the attestation of the public prosecutor, there is no reason why its authenticity or its character, as a valid official accusation, shall be afterwards brought into question."

Then he refers to the conflicting decisions, *Webster's Case*, 5 Greenleaf 432, where the omission of the words, "true bill," was held fatal, on the ground that the signature might only indicate the foreman's opinion, which he thinks inapplicable; and also the later decision of *The State v. Freeman*, 13 New Hamp. 488, which he follows. Then he says :

"The words, 'a true bill,' obviously constitute no part of the description of the offence charged in the indictment. They are not indispensable to the due and legal authentication of the action of the grand jury. Their absence can subject the accused to no inconvenience or disadvantage. The reason upon which they are elsewhere held to be essential does not exist in our practice and mode of procedure. And therefore this omission in an indictment is simply the omission of a form which, if oftentimes found convenient and useful, is in reality immaterial and unimportant."

The case of *Rex v. Ford*, Yelv. 99, is cited in Comyn's Digest and in 1 Chitty's Crim. Law, as authority for a statement that the indorsement is a part of the indictment. It has been explained, and the authorities show, that this indorsement is but the evidence of the assent or dissent of the grand jury. In 2 Hale's Pleas of the Crown 162, it is said :

"But the safest way is to deliver them a new bill for manslaughter, and they to indorse it generally *billa vera*, for the words of the indorsement make not the indictment,



but only evidence the assent or dissent of the grand inquest; it is the bill itself is the indictment when affirmed."

In *State v. Burgess*, 69 Am. Dec. 433, the court said :

"And although in 1 Chitty's Crim. Law 324 it is said that an indorsement, 'a true bill,' becomes part of the indictment and renders it a complete accusation, yet *Rex v. Ford*, Yelv. 99, which is referred to as authority, does not seem to warrant the assertion; indeed, the position is contradicted by the form of the record, which, when formally drawn up, omits all mention of the indorsement, and states in the caption merely that the grand jury present that the accused did, &c., reciting the allegations of the indictment, and this is the principle upon which the want of a proper indorsement is disallowed, in arrest of judgment, after a conviction."

And in the note to Comyn's Digest, title indictment, this is added by way of explanation to *Ford's Case*: "That is, the indorsement of a true bill, coupled with the indictment, forms a complete accusation." And a later case than Ford's is *Rockwood's Case*, for high treason, 13 Howell St. Trials 139. The court was composed of Lord Chief Justice Holt, L.C.J., Trelby, and Nevill, Powell and Eyre, JJ. Counsel for the prisoner, among other things, contended as follows :

"Now, the design of this Act of Parliament, in giving the prisoner a copy of the indictment so long before the trial, was not only to enable him to make use of the defence upon the trial, but also to advise with counsel to plead, so the words are, the 'better to enable him to plead.' Now, we say, to answer this end, it is necessary we should have a copy of the whole indictment as it stands before your Lordships in court. And another reason is this: It is no indictment unless it be presented by the jury as their inquisition upon oath, into some court that has jurisdiction of the matter. What we have delivered to us is only a copy of a bill as to be delivered to a grand jury to be found: non constat, that it is found. Now, the intent of the Act of Parliament being to give the prisoner this advantage to enable him to plead, he may have several pleas of which he

might take a legal advantage, if he had a copy of the whole, which he knows not how to come at now, &c."

Holt, L.C.J., later in the case said :

" Now, this cannot be, for an indictment is not an indictment till it be found ; it is only a writing prepared for the use of the jury, and for expedition. It is nothing till it is found, for the jury make it an indictment by finding it ; they may alter what they please or refuse it absolutely. And if the jury, upon examining the witnesses, would only present a matter of fact, with time and place, the court might cause it to be drawn up into form without carrying it to the jury. Again, there needs no *billa vera*, for that is only the jury's owning that which the court has prepared and drawn up for them." . . .

And later, p. 159, Holt, L.C.J., said :

" A panel is a panel when it is arranged, but a bill is not an indictment till it be found. . . . All that we say of it before it be found is that there was *quaedam billa* preferred to the grand jury ; and if the jury bring it in *ignoramus*, whereby they disown the presentment, it is cancelled, and there is no record of it, nor nothing, only a memorandum in the clerk's book perhaps, that such a thing was."

3. In Townsend's case no one had been bound over to prosecute, and the question is whether the indictment has been legally preferred under section 641 of the Code. It appears to me that this provision, which aims at vexatious indictments, contemplates the preferring of an indictment under the following restrictions :—

(1) If a person has been bound over to prosecute, he may prefer a bill.

(2) The Attorney-General may. There are, of course, many cases of a public nature where there is no private prosecutor. He, on behalf of the Crown, and anyone by his directions, may.

(3) A person who has a special injury to redress, as in nuisance and in libel cases, if he wishes to prefer a bill of

indictment, must, if there has been no preliminary inquiry, first obtain the consent of a judge, or of the Attorney-General, and in the written consent the offence must be specified.

(4) And any person may prefer a bill of indictment before the court, by order of that court.

Now, under the facts stated here, this indictment could only come under the heading providing for its being preferred by the direction of the Attorney-General, or for its being preferred by someone under the order of the court. The prosecution was carried on by Mr. Wickwire, barrister, under a written authority (not in the case) given under a provincial statute, which is as follows :

“ It shall be the duty of the Attorney-General to appoint some Queen's Counsel, or other competent barrister of the court, to attend the criminal business of each sitting of the Supreme Court in each county in the province on behalf of Her Majesty. The authority in this behalf shall be conveyed by written instructions under the hand of the Attorney-General, and the presentation of such instructions to the presiding judge shall, in the absence of the Attorney-General, be a sufficient authority for any barrister to take charge on behalf of the Crown of criminal business, and to conduct the trial of criminals at any sittings or term.” 1887, (N.S.) chap. 66, s. 2.

These words are sufficiently large to cover the specific act of preferring a bill of indictment. In contrasting the two expressions in the section of the Code—namely, “by his direction” and “with the written consent of . . . the Attorney-General . . . for any offence specified in such consent”—one might conclude that, in the former case, the offence at least need not be specified. But if it is a judicial act, and the delegation of such a duty can only be under a statute, I am disposed to hold that the Attorney-General must direct the preferring of the bill in the particular case. And it will not do to direct the counsel to prefer bills in all cases which may arise.

Then, was Mr. Wickwire acting under the order of the court? Having preferred the bill under the eye of the court, and with its approbation, by silence, it would not be difficult to say that it was equivalent to an order of the court. But there is this difficulty here. There may have been no application made to the court for an order, and no order made, because it was assumed that the general authority from the Attorney-General to Mr. Wickwire, was sufficient to enable him to prefer the bill. And it would be going far to hold that an order might be drawn up by the officer of the court upon such equivocal evidence as that. The learned judge, in the reserved case, does not say that he had, even in his mind, such an order.

In my opinion, the conviction against Townsend must be quashed. But this does not involve the same result in the case of Whiting. I cannot see that he would be prejudiced by being tried with Townsend; a new trial would not necessarily be granted to both; Bishop on Criminal Procedure, sec. 977. The conviction against Townsend must be quashed.

WEATHERBE, J., concurred.

MEAGHER, J.—

The defendants were tried under an indictment “for an assault on a peace officer, and for resisting and preventing apprehension and detainer,” and were convicted.

The learned trial judge suspended sentence and reserved a case for the consideration of this court, in which, amongst other things, it is stated that

“The names of six witnesses were indorsed on the indictment when brought into court, none of whom were sworn in open court. There were no initials, or name of the foreman or any grand juror written against the name of any of such witnesses.”

Upon this statement of fact, we are required to determine whether or not the absence of such initials or name affords

sufficient ground for quashing the indictment. The learned trial judge refused to quash on this ground, because he was of opinion that section 645 of the Code was, in this respect, directory. Section 645 is as follows :—

“The name of every witness examined, or intended to be examined, shall be endorsed on the bill of indictment; and the foreman of the grand jury, or any member of the grand jury so acting for him, shall write his initials against the name of each witness, sworn by him and examined, touching such bill of indictment.”

The question arising upon this branch of the case is covered by very high authority; but even if that did not exist, I cannot discover any reason or principle upon which it could be said that failure to affix such initials to the name of each witness, sworn before the grand jury, constituted good ground for quashing an indictment. The same question was fully discussed and determined in *O'Connell v. The Queen*, 11 Cl. & F. 155. Thomas Steele, one of the defendants in that case, alleged as a ground of error—

“That the indictment was not found, and returned a true bill, pursuant to the provisions of the statute 1 & 2 Vict., ch. 37, inasmuch as that, in stating the names of the witnesses so produced and examined, and whose names were indorsed on the bill of indictment sent before the grand jury, neither the foreman nor any other member of the grand jury, by his initials or signature, as is required by the last-mentioned statute, did authenticate the fact that the witnesses or any of them had been sworn, or had made affirmation or declaration as aforesaid, nor state that no other witnesses or witness, save those named as aforesaid, were or was examined by or before the grand jury.”

The part of section 1 of 1 & 2 Vict. (Imp.), chap. 37, which was material in support of the error so assigned, was in these words :—

“And the foreman, or other member of the grand jury who shall have administered such oath, or affirmation, shall upon the back of such bill of indictment, state the name or

names of such witness or witnesses as shall have been duly sworn, or shall have made such affirmation before him, and authenticate the same by his signature or initials."

The statute there required the foreman, or some other member of the grand jury, to swear the witnesses before examining them. The argument upon this branch of that case, shortly stated, was :

"It could not be said that this part of the statute is merely directory : it is essential. The power which the statute grants is a new power, unknown to the common law: it is created by the statute, and must be used exactly according to the statute. It requires to be the more strictly followed, as it is a power to be exercised in secret. Suppose an indictment against one of the witnesses for perjury, in the absence of the certificate it would be impossible to prove that he was sworn, the grand jurors themselves being sworn to secrecy as to the proceedings before them. There being a material defect in the proceedings, it is impossible to say that the bill was duly found."

Lord Tindal, Chief Justice, speaking for himself and all the other judges, in answer to the questions put by the House of Lords to the judges, said (see page 251) :

"In the case of the writ of error coram nobis brought by the defendant Thomas Steele, the error assigned was this, that the indictment was not found in the manner required by the statute 1 & 2 Vict., c. 37, inasmuch as that, in stating on the back of the said alleged bill of indictment the names of the witnesses who had been sworn, &c., neither the foreman nor any other member of the grand jury did authenticate by his signature or initials, as is required by the statute, that the said witnesses, or any of them, had been sworn or made affirmation or declaration, nor that no other witnesses, save those named in the assignment of errors, were so sworn or affirmed, or examined before them."

At page 254, dealing with the question so raised, he said :

“And with regard to the error in fact assigned by the defendant Thomas Steele, it is manifestly founded on a part of the section that is directory only and not essential. The oath must have been already administered (which is the essential part of the enactment) before, in the language of the statute, ‘the foreman who shall have administered the oath’ is directed to state the names of the witnesses sworn and to authenticate the same by his signature or initials; that is, before the objection above made can possibly arise. As a matter of convenience, at the trial, in order to ascertain at a glance whether the witness examined before the crown jury was one of those who appeared before the grand jury, such direction ought undoubtedly to have been complied with; but it cannot be the law that, after the witness has been duly sworn and examined, and the bill returned a true bill upon his evidence, it can be deprived of its legal operation and character by reason of the foreman of the grand jury having neglected to comply with such direction of the statute. The ninth question, therefore, we all concur in opinion must also be answered in the negative.”

The cases of *The Commonwealth v. Edwards*, 4 Gray (Mass.) 1, and *State v. Wilkinson*, 76 Maine, 317, are also in point; see also vol. 9, Am. and Eng. Encyc. of Law, pages 14 to 16. The argument made for the accused in the case in 4 Gray was in substance the same as that urged before us.

The Interpretation Act provides that the word “shall” shall be read as imperative; but I do not see that this should be regarded as making that word imperative, where, as here, the context shows it was intended to be directory only. There are other rules prescribed by the Interpretation Act which enable us, I think, to give effect to this view.

The case states that the indictment was indorsed as follows :—

*In the Supreme Court, 1895.*

The Queen v. Wm. H. Townsend and Alfred Whiting.

“Indictment for an assault on peace officer, and for resisting and preventing apprehension and detainer.”

(Sgd.) F. E. PALMER, *Foreman Grand Jury*.

"The words 'true bill' did not appear indorsed on the indictment. The grand jury had, previously to their bringing in the indictment with this indorsement, come into court and stated that they had found a bill against both defendants."

"A motion was made to quash it against both defendants on the ground of the absence of these words, and that the bill did not purport to have been found until it had been so indorsed. I thought the words not necessary and refused to quash, though, having some doubt, reserved the question."

"The second question is, whether the indictment should have been quashed on the ground of the absence, as above mentioned, of the words 'true bill.'"

An indictment is defined to be a written accusation of an offence preferred to and presented upon oath as true by a grand jury at the suit of the Government. If the grand jury are satisfied of the truth of the accusation, they write on the back of the bill "a true bill." The bill is then said to be found, and is publicly returned into court; the party stands indicted, and may then be required to answer the charge against him; Story on the Constitution, sec. 1784.

In the notes to Archbold's Criminal Pleading and Evidence by Waterman, vol. 1, page 99, it is said:

"The indorsement, 'a true bill,' made upon the bill becomes part of the indictment and renders it a complete accusation against the prisoner."

See also Chitty's Criminal Law, vol. 1, page 324 (edition of 1816) to the same effect.

When the jury have made the indorsements on the bills, they bring them publicly into court, and the clerk of the court calls each juryman by name, and then the clerk of the peace or assize asks the jury whether they have agreed upon any bills, and bids them present them to the court. The clerk then reads over the name of the offenders and offences, with the finding of the jury, which is either "a true bill," or "not found" or "no bill," as the case may be.



In *The King v. Ford*, Yelv. 99,—

“The defendants were indicted on the statute of 8 Hen. 6 for a forcible entry, and also for forcible detainer of a messuage, being the freehold of Richard Harlakenden, and this indictment was preferred at the sessions of the grand jury, who returned it in this manner, viz., as to the entry with force, ‘ignoramus,’ as to the detainer with force, ‘billa vera.’ But this indorsement, not being spied, but being taken by the justices for a full indictment on both points, they awarded restitution to Harlakenden; but afterwards, this indictment being certified into the King’s Bench by certiorari, and the indorsement returned in manner ut supra, they awarded restitution. Yet Yelverton moved that they ought not to regard the indorsement, for the court did not send for it, but for the indictment, and this indorsement makes it no indictment at all, so the clerk of the peace did more than he was commanded to do; but, per curiam, the indorsement is parcel of the indictment, and the perfection of it, and the court sent for the indictment, cum omnibus id tangen, and the indorsement touches it principally, for it is the life of it.”

In Comyn’s Digest, title “Indictment,” 494, it is said :

“The indorsement upon the indictment made by the jury is part of the indictment.” *The King v. Ford*, cited above, is given as authority for the proposition stated in the text.

The foot-note to that passage is as follows :

“That is, the indorsement of ‘a true bill,’ coupled with the indictment, forms a complete accusation. . . . The indictment (that is, when so indorsed) is then said to be found, and, when so found, is publicly delivered into court.”

In Hale’s Pleas of the Crown, vol. 2, page 162 (1st American Edition), the law is thus stated :

“If a bill of indictment be for murder, and the grand jury return it *billa vera quoad manslaughter* and *ignoramus quoad murder*, the usual course is, in the presence of the

grand jury, to strike out *malitiose* and *ex malitia sua prae-cogitata* and *murderavit*, and leave in so much as makes the bill to be but bare manslaughter, and so to receive it."

"But the safest way is to deliver them a new bill for manslaughter, and they to indorse it generally *billa vera*, for the words of the indorsement make not the indictment, but only evidence the assent or dissent of the grand inquest. It is the bill itself, is the indictment when affirmed."

The foregoing authorities show that a uniform practice has prevailed in England for very many years, and the importance of the indorsement of the words "a true bill," as evidence of the finding of the grand jury to make the accusation contained in the indictment complete, is clearly recognized. Experience has proved that the practice in question was a necessary and wise one. Its adoption has, no doubt, often prevented confusion and uncertainty as to what the findings of grand juries were. I do not think it would be wise, even if I thought we were at liberty to depart from it, especially in this province, where the records of the proceedings of the court, in many of the counties, are not kept as fully or accurately as they should be.

If from any cause no record of the findings of the grand jury upon indictments should be made, or that which is kept is inaccurate or insufficient—a circumstance which, from my experience with some of the officers of this court, I am prepared to say, is liable to occur in spite of the utmost care on the part of the presiding judge—the matter would be at large, if one may use such an expression, and the proof of what did take place would rest upon oral testimony alone, or largely so. Such an inquiry would, to my mind, be as unseemly as it would be unsatisfactory in most cases.

By section 760 of the Code it is provided that a calendar of the criminal cases shall be sent by the clerk of the Crown to the grand jury in each term, together with the depositions taken in each case, and the names of the different witnesses; and the indictments shall not be made out, except in Halifax, until the grand jury so directs.

In the country, the grand jury come into court and report

that in certain cases they are prepared to find bills ; but I should be greatly surprised to find any record made of that step. As soon as practicable after such report is made, the prosecuting counsel prepares and hands the indictments to the foreman. The indorsement is then made upon each one, and they are brought into court and handed to the clerk of the Crown, who, after obtaining their assent to the amendment of all matter of form, reads the indorsement on each indictment ; for example, thus : "The Queen against John Smith for theft, you find a true bill." If the words, "a true bill," are not indorsed upon the indictment he, of course, would not use them.

It was argued that the provisions of the section just quoted changed the practice, in the country at least, so far as to put it out of the power of the grand jury to make any indorsement in cases where they did not find a bill, because they would not have a bill before them upon which to make it. The grand jury, even in the country, under this section, has the power to direct that indictments shall be prepared in all cases upon the calendar furnished to them, even though they may not be prepared to find them, and may intend not to do so. Assuming they do not so direct, it is nevertheless competent for them, through their foreman, to indorse the words "no bill," or other equivalent expression, upon the depositions in each case, or upon the calendar, opposite to the title of each cause, which they return to the court. But if it is not competent for them to do any of the things which I have suggested in relation to cases in which they do not find a true bill, that does not appear to me to afford any sufficient reason for not observing the practice, which has hitherto prevailed, in relation to the indorsement to be made upon bills which they do find.

I think the objection urged against the conviction in this respect is both sound and substantial, and should prevail.

If we possess the power to order the accused to give bail to appear at the next term of the court at Kentville to stand their trial, I can see no valid objection to its being exercised.

I also concur in the conclusion that a written order or direction was necessary, so far as defendant Townsend was concerned.

HENRY, J.—

I concur in the opinion of my brother Graham. As to the argument, based upon the uniformity and antiquity of the practice in England in respect of the indorsing of the words “a true bill” upon indictments, to the effect that it could be abrogated only by express legislation, it would seem sufficient to cite the wholesome and progressive principle that a law ceases to exist when the reason for it comes to an end.

*Townsend's conviction quashed.*

## [COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE WURTELE, J.

**Ex parte SEITZ, (No. 1).**

*Extradition—Power of Extradition Commissioner—Warrant against fugitive who is neither within, nor suspected to be within, his territorial jurisdiction—Execution of warrant in another province—Habeas corpus—Review of findings—Extradition Treaty with Germany—Extradition Act, R.S.C. 1886, c. 142, s. 5 and 7.—Cr. Code 305, 311.*

1. An extradition commissioner appointed under the Extradition Act (Can.) has jurisdiction only within the province for which he has been appointed; and has the power to issue a warrant for the arrest of a fugitive only in case the latter is in or is suspected to be in the province in which the commissioner has jurisdiction.
2. Where the complaint in an extradition matter shows that the fugitive is in a province other than the one in which the commissioner has jurisdiction, and other than the one in which the extradition complaint is laid, the issue of a warrant of arrest thereon and its execution in such other province is illegal.
3. When a warrant of arrest has been legally issued by an extradition commissioner, it may be executed in any part of Canada without endorsement.
4. On the return of a writ of habeas corpus in an extradition proceeding, the judge has no power to review the decision of the extradition commissioner on the ground that it is against the weight of evidence.

MONTREAL, July 19, 1899.

WURTELE, J.—

The Imperial German consul for Canada, Franz Bopp, on the 13th May last, laid a complaint before Ulric Lafontaine, a commissioner duly appointed under the Extradition Act (Can.) for the Province of Quebec, charging one Jean Seitz with having unlawfully embezzled at Manheim, in Germany, the sum of 9,000 marks, equal to about \$2,200.00 current money of Canada, and stating that he had been credibly informed that the accused was a fugitive from justice, and that he was

on his way to some place in the Dominion of Canada, probably to the city of Toronto, where it was even likely that he then was, and that his address there was No. 286 Victoria Street. Thereupon, on the same day, 13th May last, the extradition commissioner issued his warrant for the arrest of the fugitive, Jean Seitz, and placed it in the hands of the high constable of the district of Montreal, Adolphe Bissonnette. The high constable proceeded to Toronto; and after having got the warrant backed by the police magistrate of that city, G. T. Denison, he arrested the accused there, and brought him from there before the extradition commissioner in the city of Montreal.

After hearing the case, the extradition commissioner on the 14th July instant (1899) committed the accused to prison at Montreal, to remain there until he should be surrendered to the officers appointed to receive him by the Government of the German Empire, or discharged according to law.

The accused applied for a writ of habeas corpus, which I granted, and he has been brought before me in order that the sufficiency of the proceedings had before the extradition commissioner should be inquired into.

The accused has raised three points, which I have to consider and decide, viz.:

1. That the extradition commissioner's jurisdiction is limited to the Province of Quebec, within the limits of which alone he is authorized to act judicially in extradition matters; and that, consequently, he had no power to issue a warrant for the arrest of the accused, who was not, when it was applied for and issued, within the limits of the Province of Quebec, and who was shown by the complaint to have been at that time in the Province of Ontario;
2. That the evidence did not show that the crime of embezzlement had been committed; and
3. That the prisoner's identity had not been satisfactorily proved.

In extradition matters, the duty of the judge on habeas corpus is to inquire whether the extradition commissioner

had jurisdiction under the treaty with the country in which the person is accused of having committed the crime with which he is charged, and under the statute passed for the purpose of giving effect to the provisions of such treaty ; to see whether he has exceeded his jurisdiction ; and to ascertain whether he had before him any legal evidence of facts on which to found a judgment as to the probable criminality of the accused. If any reasonable and legal evidence was laid before the extradition commissioner, its sufficiency and his decision on questions of fact founded on such evidence will not be reviewed on habeas corpus ; the judge will not review the decision on the ground that it is against the weight of the evidence.

The judge on habeas corpus examines the legality of the proceedings had before the extradition commissioner, and whether the evidence submitted to him was legal ; but he does not re-try the case. He has no power to review the decision of the extradition commissioner on the ground that it is against the weight of the evidence laid before him. The judge on habeas corpus does not constitute and form a court of appeal on the merits of the case, and he will not question the judgment of the extradition commissioner if the case was within his jurisdiction and if there was any legal and competent evidence to support his decision. The judge must, therefore, accept the extradition commissioner's decision on all questions of fact founded on such legal and competent evidence as may have been submitted to him.

The evidence submitted to the extradition commissioner, in the present case, shows that Jean Seitz and one Utto Esslinger were partners, carrying on business as cigar manufacturers at Manhein, and that from August, 1898, to the first day of April, 1899, he collected outstanding debts due to the firm to the amount of 3,152 marks, which he did not enter in the books of the firm, but appropriated to his own personal wants ; that on the same first day of April, 1899, he made a draft on behalf of the firm on the bankers of the firm for the sum of 6,000 marks, which the bankers

accepted, and that he discounted the draft after its acceptance and fraudulently appropriated the proceeds to his own use, and that he subsequently absconded and went to Toronto with part of the proceeds.

By the treaty with Germany the crimes of embezzlement and larceny are extraditable offences. By article 246 of the German Penal Code, the fact of a person appropriating movable property not his own, which he has in his possession or keeping, is declared to be a crime and renders him liable to be punished by imprisonment. The article in question calls this crime embezzlement, but the circumstances set forth in it constitute in this country the crime of theft, which before our Criminal Code was known as larceny.

The crime committed by the prisoner, according to the evidence, was the crime of stealing by a partner the property of the partnership of which he was one of the members. This crime at the date of the treaty with Germany was known indifferently as embezzlement or larceny, and was defined and constituted by section 58 of "The Larceny Act" (R.S.C., cap. 164, sec. 58), and the section runs that any co-partner who stole, embezzled or unlawfully converted any money of the partnership to his own use was liable to be punished as if he were not a member of the partnership, and it comes under the purview of the article of the German Penal Code to which I have referred; and in both the German Penal Code and "The Larceny Act" (Can.) it is called, *inter alia*, embezzlement.

This offence is now contained in article 311 of our Criminal Code in combination or association with article 305, and is at present known by the generic term of 'theft.'

The facts shown by the evidence clearly establish and constitute the crime defined in section 246 of the German Penal Code and in article 311 of our Criminal Code, in combination or association with article 305; and whether it be termed embezzlement, or larceny, or theft, it is clearly an extraditable offence under the treaty with Germany.

I have examined the documents and the depositions



produced before the extradition commissioner, and I am satisfied that they have been properly authenticated ; and I am further satisfied that the evidence given before him was legal and competent. As respect the proof given, this is all I have to ascertain on habeas corpus, as I am not called upon to review the extradition commissioner's decision on questions of fact founded on evidence given to him, which I find to have been legal and competent ; I have only to see that he had such evidence before him as gave him authority and jurisdiction to commit.

The last two points raised before me at the argument, namely :

1. That the evidence did not show that there is a probability that the prisoner had committed the crime of which he is accused, or, in other words, that there is not a probable and sufficient case against him ;

2. That the identity of the prisoner with the person accused has not been satisfactorily proved ;

Are really questions of fact, and the extradition commissioner has decided that both points were duly proved and established, and that a sufficient case has been made out to put the prisoner upon his trial.

I therefore overrule and reject these two points ; and I will now take up and consider the first point, as to the power of the extradition commissioner to act judicially in this matter as he has done.

Treaties for the extradition of offenders exist between England and a number of foreign States, and, both in England and here, statutes have been enacted for the purpose of giving effect to them and of carrying out their provisions. The treaty with the German Empire provides that anyone who is accused or convicted of a crime mentioned in it, which may have been committed in the territory of the one party and who may be found in the territory of the other party, shall be extradited. The Imperial Act to give it effect was passed in 1870, and it provides that the warrant for the apprehension of a fugitive criminal, who either is in

or is suspected of being in the United Kingdom, may be issued by a chief magistrate of the Metropolitan Police Courts, or one of the other magistrates of the Metropolitan Police Court in Bow Street, on the receipt of an order from one of the Secretaries of State requiring such magistrate to issue his warrant, or by any such magistrate or by any Justice of the Peace on such complaint and evidence as would justify the issue of a warrant, if the crime had been committed in that part of the United Kingdom in which he exercises jurisdiction. When, however, the fugitive is arrested under the warrant of a Justice of the Peace, the investigation does not take place before him, but he is brought before one of the metropolitan magistrates whom I have mentioned, who hears the case and either commits him to prison for surrender or discharges him, as the case may be. When the fugitive is committed for surrender, the magistrate sends him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant for his surrender. Section 13 provides that the warrant of one of the magistrates whom I have mentioned may be executed in any part of the United Kingdom without being endorsed by a Justice of the Peace having jurisdiction in the place where it is to be executed. Under the Imperial Act such magistrates, whether they act on a requisition or on a complaint, have jurisdiction throughout the United Kingdom, and, consequently, their warrants are executory in every part of the United Kingdom; but the same extended jurisdiction is not given to ordinary Justices of the Peace, who can only act and only have jurisdiction within their districts. In the case of crimes committed at sea, jurisdiction to arrest a fugitive criminal and to hear the case against him is given in England and Ireland to stipendiary magistrates, and in Scotland to sheriffs and their substitutes; but their jurisdiction is limited to the part of the United Kingdom for which they have been appointed and exercise jurisdiction, and, consequently, their warrants are not executory throughout the United Kingdom as the warrants of the metropolitan magistrates are.

Our Act for the extradition of fugitive criminals is chapter 142 of the Revised Statutes of Canada (1886), and is cited as "The Extradition Act."

By our Act all judges of the Superior Courts and of the County Courts of any province, and all commissioners who may be appointed in any province by the Governor in Council, are authorized to act judicially in extradition matters within the province for which they have been appointed; and section 5 declares that they have all the powers and jurisdiction of any judge or magistrate of the province, but confers no greater or further jurisdiction. Then section 6 authorizes any judge or extradition commissioner to issue a warrant for the apprehension of a fugitive criminal on a complaint laid before him on such evidence, or after such proceedings as in his opinion would, subject to the provisions of the Act, justify the issue of the warrant if the crime had been committed in Canada.

The initial step necessary to give jurisdiction in extradition proceedings is a complaint on oath, charging a fugitive criminal found within the jurisdiction of any province of the Dominion of Canada with having committed within the jurisdiction of the demanding Government a crime mentioned in the treaty, and reciting the requisites prescribed by the treaty and by the Extradition Act. The complaint must set forth clearly, but briefly, the substance of the offence charged, its substantial and material features, so that the extradition judge or commissioner in the first instance, and afterwards the judge on habeas corpus, can see that a crime enumerated in the treaty has been committed.

Upon receiving a complaint respecting a crime committed here, a magistrate must hear and consider the allegations of the complainant, and he should only issue a warrant if he is of opinion that a case for doing so has been made out. The act, therefore, of issuing a warrant is not a ministerial act, but is a judicial proceeding.

Now, under section 5 of "The Extradition Act," a judge or commissioner can only act judicially in extradition matters in the province for which he has been appointed,

and under section 6 he can only issue his warrant in cases where he could do so if the crime of which the fugitive criminal is accused had been committed in Canada. Judges, magistrates and Justices of the Peace are appointed for defined territorial limits, within which alone they can act judicially. Under the provisions of our Criminal Code a complaint in writing and under oath may be laid before any magistrate or Justice of the Peace, within his territorial jurisdiction ; and he has jurisdiction and power to issue a warrant for the apprehension of the person against whom such a complaint has been laid, only when such person is, or is suspected to be, within the territorial limits over which the magistrate or Justice of the Peace has jurisdiction, or when such person is accused of having committed the offence in such limits, or when it is alleged that he has property which was unlawfully obtained within such limits, or when such person has in his possession within such limits any stolen property.

The first and the last cases are the only ones which apply in extradition matters ; but as a judge or a commissioner has been given in extradition matters jurisdiction over the whole of the province for which he has been appointed, it follows that his jurisdiction is extended from the limits of a judicial district to the limits of his province.

In the present case, the complaint does not allege that the fugitive criminal either was or was suspected to be within the limits of the Province of Quebec ; but, on the contrary, it positively states and shows that he was, at the time the complaint was laid, at Toronto in the Province of Ontario. Mr. Lafontaine, the extradition commissioner before whom the complaint was laid, had only power to act judicially within the Province of Quebec ; and his act of granting and issuing a warrant, under the circumstances stated, for the apprehension of a fugitive criminal who was not in, nor suspected to be in, the Province of Quebec, but was in the Province of Ontario, was irregular and illegal, and its endorsement by a police magistrate in Toronto, could not give it any legal effect.

It is true that section 7 of "The Extradition Act" provides that a warrant issued by an extradition commissioner can be executed in any part of Canada ; but this section has evidently been taken indiscriminately from the Imperial Extradition Act, which gives to the metropolitan magistrates whom I have mentioned an extended jurisdiction in extradition matters which is not given to ordinary Justices of the Peace nor to the magistrates who act in the case of crimes committed at sea ; and the section of the Imperial Extradition Act only makes the warrant of such metropolitan magistrates whose jurisdiction extends throughout the United Kingdom executory throughout the whole territory, but does not give the same effect to a warrant issued by an ordinary Justice of the Peace or by stipendiary magistrates, sheriffs and sheriff's substitutes. The jurisdiction of metropolitan magistrates extends over the whole of the United Kingdom, whereas judges and extradition commissioners in Canada can only act within their respective provinces, and have no authority whatever outside of them under our Extradition Act ; and there is therefore a reason to make the warrants of the metropolitan magistrates executory throughout the whole extent of the United Kingdom, which does not exist with respect to judges and extradition commissioners in Canada for the whole Dominion.

The power and right to legally issue a warrant is one thing, while the power and right to legally execute a warrant outside of the territorial jurisdiction of the magistrate who issued it is another thing. A Justice of the Peace can legally grant and issue a warrant against a person who either is in, or is suspected to be in, his territorial jurisdiction. If the accused is found in the territorial jurisdiction of the Justice of the Peace, he is of course arrested there ; but if the accused has departed and got away into another jurisdiction after the complaint has been made, and cannot, therefore, be found in the territorial jurisdiction of the Justice of the Peace who issued the warrant, he can be arrested in any other district where he may be found upon the warrant being backed, when the warrant was legally

issued, and is therefore effective. But if a warrant has been illegally issued, it is without legal effect, and it cannot be validly executed anywhere, either within or without the magistrate's territorial jurisdiction.

The same rules apply to the issue and the execution of warrants in extradition matters. This section of our Extradition Act is not, therefore, of general application in the Dominion of Canada, where the jurisdiction of the judge or commissioner in extradition matters is expressly restricted, and it cannot of itself confer, in the face of such restriction, an extended jurisdiction. It has, however, its effect when the complaint alleges that the fugitive criminal is in, or is suspected to be in, the province, and when he was really within the limits of the province at the time the warrant was issued, and after the issue of the warrant he flies from the province in which it was issued and gets away into another territorial jurisdiction. In such a case the warrant has been legally issued, and is therefore effective, and the fugitive criminal may be arrested in any other province under the warrant without it being necessary to obtain any endorsement on it.

It seems reasonable and right that the jurisdiction of judges and commissioners in extradition matters should be restricted to their own province, for, if a fugitive criminal can be arrested in Toronto on proceedings instituted and on a warrant issued at Montreal, notwithstanding the fact that he has never been in the Province of Quebec, he could also be arrested either at Halifax, on the eastern limits of the Dominion, or at Victoria, near its western limits; and this would involve great inconvenience for all parties and heavy expenses for the Government demanding the extradition, which certainly was never the intention of Parliament.

While in the United Kingdom the fugitive criminal must be committed to a prison in the capital to await his surrender, in Canada he is committed, not to a prison in Ottawa, but to the nearest convenient prison. This indicates that the jurisdiction of the judges and extradition commissioners is limited to the province for which they have been

appointed and in which they exercise jurisdiction and have power to commit to prison ; and, in fact, the general tenor of the Extradition Act clearly shows that they can only act judicially in their respective provinces.

The judicial act of the extradition commissioner in granting and issuing his warrant in the present case being irregular and illegal, it follows that the arrest and all the subsequent proceedings are also irregular and illegal ; and therefore the committal and the warrant of commitment are bad, and the prisoner is entitled to be discharged.

I therefore maintain the writ of habeas corpus, and I order that the prisoner, Jean Seitz, be discharged from imprisonment and detention in the present matter.

*Prisoner discharged.*

*W. J. White, Q.C., for the petitioner.*

*Edmund Guerin, Q.C., for the prosecution.*

## SUPREME COURT OF NEW BRUNSWICK.

BEFORE TUCK, C.J., HANINGTON, LANDRY, VANWART AND  
McLEOD, JJ.

**Ex parte BAIRD.**

*Company—Sale of Intoxicating Liquors—Liability of Manager  
for illegal sales by clerk—Canada Temperance Act.*

1. The president of an incorporated company acting as manager thereof is responsible for an illegal sale of intoxicating liquors, made by one of the company's clerks acting under his general directions, and may be convicted in respect of such sale, of an offence under the Canada Temperance Act.

ARGUED : November 4, 1896.

DECIDED : February 5, 1897.

On the first day of Trinity Term, 1896, the Court granted rules nisi for certiorari to remove two convictions made against the applicant, H. Paxton Baird, by the police magistrate of the town of Woodstock, for selling liquor contrary to the provisions of the second part of the Canada Temperance Act, with a view of quashing the same, on the ground that the sales were made by a clerk in the employ of "The H. Paxton Baird Co., Limited," a corporation duly incorporated, of which defendant was president and manager, and not by the defendant or his agent.

FREDERICTON, N.B., November 4, 1896.

*A. B. Connell, Q.C.*, shewed cause, citing *Rex v. Medley*, 6 C. & P. 292. Per Holt, C.J. : Anonymous Case, 12 Mod. 560 ; *Murray v. Nelson Lumber Co.*, 143 Mass. 250.

*Carvell*, in support of rule, relied on *Reg. v. Slaterry*, 26 Ont. R. 148 ; *Reg. v. Charles*, 24 Ont. R. 432 ; *Bowyer v. Percy Supper Club*, (1893) 2 Q.B. 154 ; High on Injunctions, 952.



FREDERICTON, N.B., February 5, 1897.

TUCK, C.J.—

There was only one point argued in this matter. Baird was twice convicted before Police Magistrate Dibblee, of Woodstock, for violation of the second part of the Canada Temperance Act. The defendant's counsel contends that this conviction should be quashed, on the ground that the sales were made by a clerk in the employ of Baird & Company (Limited), a joint stock company duly incorporated, of which the defendant is a member. The argument is that the sales were made on account of Baird & Company (Limited), and by their direction, and not by the defendant, nor by his direction.

I think that on the merits the convictions are right. Baird was properly convicted, because he was president of the company, hired the clerks, and had the entire management of the concern. I am satisfied that the law was violated with Mr. Baird's knowledge and concurrence, and that when the clerk sold intoxicating liquor, contrary to law, he did so under general directions received from the manager. That being so, Mr. Baird ought not to be allowed to shield himself behind the corporation.

I am inclined to think that the manager is responsible for a sale made by the clerk who acted under his directions. The head man cannot escape liability by saying that the incorporated company is responsible. For several reasons the consequence might be evil if it were held that the president and manager is not guilty of the offences charged.

In *Commissioners of Police v. Cartman*, (1896) 1 Q.B. 665, it was held that the respondent was guilty of an offence under the section, for he was liable for the act of his servant, that act having been done by the servant within the general scope of his employment, although contrary to the orders of the master.

I think that Baird is liable just the same as if he had sold

the liquor himself, and that it is not necessary to look to the corporation.

I am not at all prepared to say that the corporation, as such, is liable for the act of the manager or the clerk. It may well be that they were both acting out of the scope of their authority from the company, when they sold intoxicating liquor contrary to law. The acts were illegal, and the company had no right to authorize them. In *Mill v. Hawker*, L.R. 9 Exch. 317, Cleasby B., says: "But it is equally clear that when the acts are such as the corporate body is not by law qualified to do, and the corporate body, if they pretend to do them, are acting ultra vires, then the mere fact of giving a corporate form to the act does not prevent it from being the act of those who caused it to be done. It seems plain that in such a case the individuals and not the corporation do the act, and no authority is needed for that conclusion."

In my opinion the magistrate had jurisdiction over the person and the subject matter, and there was evidence, within the principle of *Ex parte Daly*, 27 N.B.R. 129, upon which he might convict.

The rule in each case must be discharged.

HANINGTON, LANDRY and McLEOD, JJ. concurred.

VANWART, J. (dissenting).—

I think that the convictions ought to be quashed. The House of Lords has laid it down that when a person turns his business over to a company, even though all the other stockholders are merely trustees for him, still the company is a genuine one. Baird did not sell personally, nor by his agent; he did not own the liquor, and it was sold contrary to the company's and his orders. The information should have been against the clerk who made the sale. This being my view, I think the rules should be made absolute.

*Rules discharged, (VanWart, J. dissenting.)*

[SUPERIOR COURT FOR THE DISTRICT OF  
MONTREAL.]

BEFORE SIR MELBOURNE TAIT, ACTING CHIEF JUSTICE.

**THOMPSON v. DESNOYERS.**

*Warrant of arrest—Magistrate's refusal to issue—Reasons for  
magistrate's "opinion"—Revision of magistrate's decision  
by mandamus—Cr. Code 558, 559.*

1. A magistrate is not under a legal obligation to issue a warrant of arrest upon an information in respect of an indictable offence, if on consideration of the complainant's allegations he is of opinion that a case for so doing is not made out. (Cr. Code 559.)
2. A magistrate refusing to issue a warrant on an information for an indictable offence, is not bound to state his reasons for so doing; he has merely to express his opinion, after a consideration of the complainant's allegations, as to whether a warrant should be issued or not.
3. That a magistrate did not properly appreciate the evidence submitted upon an application for the issue of a warrant of arrest for an indictable offence is not a ground for a mandamus to compel him to grant a warrant against his opinion, formed in good faith.

MONTREAL, September, 1899.

TAIT, A.C.J.—

The Petitioner in this case (Thompson) asks that a writ of mandamus issue to order Messrs. Desnoyers and Lafontaine, judges of the Sessions of the Peace of Montreal, to issue a warrant for the arrest of a medical man on a charge of having committed a serious offence.

The Petitioner alleges that about the 5th of August, 1899, he presented himself before Mr. Lafontaine to lay an information against the accused; that the justice having heard the Petitioner, and before receiving his information, made certain enquiries and examined certain witnesses and more particularly the daughter of the Petitioner, and that finally on the 28th of August, he received the complaint under oath of the Petitioner; that he subsequently refused to hear certain other witnesses offered in support of the charge. He then alleges

that the magistrate, after having weighed the allegations of that petition and the deposition of the Petitioner's daughter, and the voluntary deposition of a certain other witness, and the prescriptions given by the doctor, refused to issue his warrant for the arrest of the Defendant.

Art 992 C.C.P., prescribes that "If there is no other remedy equally sufficient, beneficial and effectual, a mandamus lies to enforce the performance of an act or duty, whenever any public officer, or any person holding any office in any corporation, public body or court of inferior jurisdiction, omits, neglects, or refuses to perform any duty belonging to such office, or any act which by law he is bound to perform."

The Criminal Code in sections 558 and 559 provides as follows :

"558—Anyone, who, upon reasonable or probable grounds, believes that any person has committed an indictable offence against this Act, may make a complaint or lay an information in writing and under oath before any magistrate or justice of the peace having jurisdiction to issue a warrant or summons against such accused person in respect of such offence.

"559—Upon receiving any such complaint or information the justice shall consider, and hear the allegations of the complainant, and if of opinion that a case for so doing is made out he shall issue a summons, or warrant, as the case may be, in manner hereinafter mentioned."

Now, in this case, after hearing the complaint, the justice heard and considered the allegations thereof and, on August 30th, 1899, rendered the following judgment :—"Après avoir entendu et pesé les allégations du plaignant, je suis d'avis qu'il n'y a pas lieu de procéder contre l'accusé et je refuse de lancer le mandat demandé."

The justice therefore heard and considered the allegations of the complainant and expressed his opinion as required by section 559. It is not alleged in the petition that the justice acted in bad faith or that his judgment was given from any improper motive or consideration, but on the contrary it is stated in the petition that having weighed the allegations,

and the depositions and exhibits produced, the magistrate refused to issue his warrant. The law does not oblige a magistrate to issue his warrant except when in his opinion a case for so doing is made out ; he is not obliged to give all his reasons ; he has merely to express his opinion as the Respondent Lafontaine has done. I do not see how it is possible for the court under the circumstances to say that the magistrate has omitted, neglected or refused to perform the duty of his office. He has performed it in the manner pointed out in the statute. The only possible excuse that I could have for interfering in this case would be that the magistrate had not properly appreciated the evidence, but I do not think that I have any right to grant a *mandamus* under such circumstances, and to make him grant or issue a warrant against his opinion, especially when it is not alleged that that opinion was not formed in good faith.

A case has been cited in which the Queen's Bench Division allowed a *mandamus* compelling the justices to hear and determine an application on a charge of conspiracy. The words in the statute in that case were, that the justices were to issue their summons "if they shall think fit." The Judges ordered the writ upon the ground that the magistrates had not exercised a discretion, but must have acted upon a consideration of something extraneous or extra-judicial, which ought not to have affected their decision, and which it seemed to the Judges, was the same as declining jurisdiction. The Judges (Cockburn, C. J., and Blackburn and Field, JJ.) all expressed the opinion that it was the rule that the Court had no jurisdiction to interfere with the decision of justices where they had decided upon a question of fact. For instance, Cockburn, C. J., remarked : "This is a case of some perplexity, but on the whole I am of opinion that the rule should be made absolute. Nothing can be clearer than that this Court has, in the absence of express statutory provision, no appellate jurisdiction to review the decision of magistrates who have once heard a case and decided it in a matter within their jurisdiction. If I could see my way to the conclusion that the magistrates have considered this evidence and given a

decision upon it, I should certainly say that the Court should not act upon the matter further, or send the case back to the magistrates." The Judges all thought, however, that the justices had not considered the question of fact, but had acted upon a consideration apart from the facts and which they ought not to have taken into account. In the present case there is no jurisdiction for me to say this of the justice who decided this case.

Mr. High, in his work on "Extraordinary Legal Remedies," at section 239, writes as follows: "The principles upon which the Courts interfere by *mandamus* with justices of the peaces are not essentially different from those regulating the interference with Courts of record, which have been considered in the previous sub-divison of this chapter. We have there seen that the writ will lie to set Courts in motion, when they have refused to act, and to compel them to exercise their rightful jurisdiction. The same rule applies to justices of the peace, and they may be compelled by *mandamus* to hear and determine matters properly within their jurisdiction, and properly brought before them."

"243a.—The general rule denying relief by *mandamus* to correct the errors of Inferior Courts in matters properly within their jurisdiction applies with equal force to proceedings before a justice of the peace, and the writ will not go to correct the erroneous action of a justice in a matter which has been judicially determined by him. And when jurisdiction over the matter in question is vested in a board of magistrates, and they have acted in the premises and have reached a decision, their action will not be corrected by *mandamus*."

"244.—When a justice of the peace, acting within the scope of his authority, has rejected a report of referees, although he may have decided upon insufficient reasons, his judgement is to be considered as a subsisting judgment until reversed by due process of law, and *mandamus* will not lie to compel him to accept the report, there having been no such refusal or delay in giving judgment as would warrant the writ."

I do not express any opinion upon the merits of the case. The magistrate has upon him the entire responsibility of refusing the warrant. All I say is that a *mandamus* cannot lie because it has not been shown that he has omitted, neglected or refused to perform his duty within the meaning of art. 992, C. C. P., and that even if I did appreciate the allegations of the complainant and the evidence differently from him this would not justify my interference.

The application must be dismissed with costs.

*Mandamus refused.*

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[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE THE HONOURABLE MR. JUSTICE DRAKE.

**Ex parte JOHN COOK.**

*Keeping a "disorderly house"—Gaming house—Jurisdiction of police magistrate to summarily try without consent of accused—Discretion to refuse summary trial asked for by accused—Alternative of preliminary inquiry—Cr. Code 198, 783, 784, 791.*

1. The term "disorderly house" in Cr. Code 783 (f) applies only to those cases which fall within the statutory definition of that term given in Cr. Code 198.
2. Upon a charge under Cr. Code 783 and 784 of keeping a 'disorderly house' in that the accused is alleged to be keeping a gaming house, the police magistrate has jurisdiction to hear and determine the charge summarily without the consent of the accused, but the exercise of that jurisdiction is discretionary with the magistrate, and he may instead proceed as with a preliminary inquiry, and commit the accused for trial.

DECIDED : February 18, 1895.

Rule nisi for a mandamus to compel John Farquhar Macrae, Police Magistrate in and for the City of Victoria, to hear and determine in a summary way a certain information laid before him against one John Cook for keeping a disorderly house—to wit, a common gaming house—at the

City of Victoria, contrary to sub-section *a* of section 198 of the Criminal Code of 1892.

Counsel for the accused requested the Magistrate to proceed to hear and determine the charge in a summary way, which he refused to do, but stated that he proposed to commit the prisoner for trial, but, at the request of counsel, deferred making the commitment in order to allow the present motion to be made.

*A. L. Belyea* supported the rule nisi.

*Gordon Hunter*, contra.

VICTORIA, B.C., February 18, 1895.

DRAKE, J.—

I think the rule for a mandamus should be discharged. In order to ascertain the meaning of disorderly house in sub-section *f* of section 783, it is necessary to refer to those sections which deal with the subject. Section 198 defines a disorderly house as being, inter alia, a gaming house. It does not include a variety of disorderly houses which may be indictable at common law, but only those especially mentioned in that section. This being the case, the Police Magistrate, under Part LV., has jurisdiction to deal with gaming houses as falling within the category of disorderly houses, but his jurisdiction is optional; the language used is that he *may* determine the charge in a summary way. If he concludes to exercise the jurisdiction, the person charged cannot object, and the Act further provides that if, after having commenced the investigation under Part LV., he may even then (section 791), at the close of the evidence for the prosecution, send up the case for trial.

Therefore, the Magistrate cannot be compelled by mandamus to hear and determine the present charge. Where a discretion is vested in a subordinate officer or tribunal, the Court cannot compel a particular course to be adopted, the



exercise of the discretion by the officer or tribunal is a complete justification. I think the rule should be discharged.

*Rule discharged.*

**Note :** *Keeping a gaming house*—"Disorderly house," meaning of—*Right of summary trial*—Cr. Code 783 (f).

A decision in conflict with the above is that of *The Queen v. France*, 1 Can. Cr. Cas. 321, by the Court of Queen's Bench for Quebec (Appeal side). It was there held by the majority of the court (Bossé, J., dissenting), that the meaning of the words "disorderly house" in Cr. Code, sec. 783 (f) and sec. 784, is governed by the rule *noscitur a sociis*, and is therefore restricted to houses of the nature and kind of a house of ill-fame or bawdy house and, that it is immaterial whether the generic term precedes or follows the specific terms which are used ; in either case the general word must take its meaning, and be presumed to embrace only things or persons of the kind designated in the specific words. The decision of the court in that case was to the effect that the provisions of sec. 783 (f) of the Code do not apply to the offence of keeping a common gaming house, and that such a charge cannot be summarily tried by a magistrate without the consent of the accused. See Vol. 1 Can. Cr. Case. 321.

## [SUPREME COURT OF NEW BRUNSWICK.]

## Ex parte PATCHELL.

*Canada Temperance Act—Sale of Liquors—Military Canteen of Infantry School Corps—Sale of liquors to men of active militia attending camp of exercise—Canada Militia Act, R.S.C., 1886, c. 41.*

1. Officers and men of the Canadian active militia while in training at a camp of exercise have an equal right with members of the Canadian infantry school corps to purchase intoxicating liquors at an infantry school canteen, under conditions of the Queen's Regulations for the Army, and this notwithstanding that the second part of the Canada Temperance Act is in force in the district.

ARGUED : January 27, 1897.

DECIDED : April 23, 1897.

A rule nisi for certiorari was granted on the first day of Michaelmas Term last, to bring up a conviction made by the police magistrate of the City of Fredericton against the applicant, Thomas Patchell, for selling liquor contrary to the provisions of the second part of the Canada Temperance Act, then in force in the said city. The applicant was a private in the Royal Regiment of Canadian Infantry, and was a waiter in the canteen where ale, groceries and tobacco were sold to the men attending the Infantry School at Fredericton aforesaid. The offence charged against him was that he sold ale to one Whipple, a member of 71st Battalion of York infantry, then on active service. Whipple at the time of the sale was in the uniform of his corps.

FREDERICTON, N.B., January 27, 1897.

*C. W. Bechwith* shewed cause against the rule nisi : The questions to be argued are two in number ; (1.) Has the R.R.C.I. a right to maintain a canteen in the City of Fredericton ? (2.) If they have, can they sell to a member of another corps then on active service ? It is submitted that neither in the Queen's Regulations nor in the Canada Militia

Act is there any power or provision for repealing the Canada Temperance Act, and, if there is, it has not been done. If they can sell to their own corps they cannot sell to a member of another corps. The Queen's Regulations govern the Canadian Militia only in so far as there is provision in the Canadian Regulations. By the latter the selling of ale, etc., in camps is specially prohibited.

*A. J. Gregory* supported the rule. The right to maintain a canteen by this corps is a personal right, and does not in any way affect or bear upon the Canada Temperance Act. The defendant not only had the right to sell, but was bound to sell : Canada Militia Act, R.S.C. 1886, c. 41, s. 82. The corps is under the Queen's Regulations : s. 82. The Queen's Regulations made provisions for establishing canteens : 1895, s. 15, paragraph 334. The corps was a unit under the regulations : paragraph 1 ; but, even if not, it makes no difference : s. 15, paragraph 73. The canteen is not confined to the particular corps, but may be used by the troops at large : s. 15, paragraphs 77 and 85. The Militia Act, R.S.C. 1886, c. 41 secs. 116 and 117, shews that the regulations have the force of law.

FREDERICTON, N.B., April 23, 1897.

The judgment of the court [HANINGTON, J. taking no part] was delivered by

TUCK, C.J.—

The defendant was, on the seventh of October, 1896, convicted before the Police Magistrate of Fredericton, of selling intoxicating liquor contrary to the provisions of the Canada Temperance Act.

The selling was admitted before the magistrate, but it was contended that the sale was not contrary to law, because it was made by the military waiter of the canteen of the Infantry School Corps at the City of Fredericton, in the County of York. This canteen was established by military orders.

The liquor was sold, not to a member of the Infantry School, but to Frederick Whipple, while he was attending the militia camp of the 71st York Battalion of active militia, which had been duly and lawfully ordered out for drill and training in a camp of exercise at Fredericton, and had been in camp from the fifteenth to the twenty-fifth of September, 1896, when the offence is said to have been committed. The witness for the prosecution, to whom the liquor was sold, was a duly enrolled member of No. 4 company of said battalion, and was, at the time of the committing of the offence charged, a member of the corps on active service in such camp, and was in uniform.

This is an application for a certiorari for the purpose of quashing the conviction.

By the Militia Act, s. 23, c. 41, Revised Statutes of Canada, provision is made that Her Majesty may raise, station and maintain, in addition to the ordinary active militia force, one troop of cavalry, three batteries of artillery, and not more than five companies of infantry, for the purpose, among other things, of securing the establishment of schools for military instruction in connection with corps established for continuous service. Section 59 of the same chapter provides for calling out the officers and men of the several corps of the active militia for drill, and, when ordered to assemble in a camp of exercise, for drill and training; section 63 enacts that they shall be considered to be on service during the whole of the period for which they are called out; sections 72, 73 and 74 have relation to the establishment of schools of military instruction in each province of Canada, and section 82 enacts that the active militia shall be subject to the Queen's Regulations and orders for the army. By these regulations and orders, for the year 1895, section 15 paragraph 82, it is provided that the canteen is to be maintained on the footing of a well-conducted tavern, for the sale of wines, malt liquors, ærated waters, etc.; and paragraph 85 says that officers, warrant-officers, non-commissioned officers and men, with their families and servants, are the only persons per-

mitted to purchase articles at any of the establishments belonging to the institute.

I am of opinion, in view of the Queen's Regulations and orders for the army, and the Militia Act of Canada, that the Infantry School Corps at Fredericton has the right to establish and maintain a canteen, to be conducted in accordance with the Queen's Regulations; and I am also of opinion that, inasmuch as the active militia is subject to these orders and regulations, every officer and man of the militia, from the time of being called out for active service, and also during the period of annual drill or training, has an equal right with the members of the Infantry School Corps to purchase ale and other articles for sale at the canteen.

I think that the rule for a certiorari must be made absolute.

*Rule absolute.*

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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE THE HONORABLE MR. JUSTICE FALCONBRIDGE.

**Re ASKWITH.**

*Witness—Privilege—Liquor License Act (Ont.)—Sale by licensee in prohibited hours—Penalty for being present in bar-room in prohibited hours—Liability of witness—Answer tending to subject him to prosecution—Habeas Corpus—Ontario Evidence Act, sec. 5—Liquor License Act (Ont.) secs. 57, 59, 115.*

1. Upon the prosecution under the Ontario Liquor License Act of a person charged as a licensee with having sold liquor during prohibited hours, a witness, other than the defendant or the wife or husband of a defendant, may properly refuse to answer any question which he swears may tend to subject him to prosecution for a penalty under that Act.

(*The Queen v. Nurse* (1898), 2 Can. Cr. Cas. 57 approved.)

ARGUED : June 17, 1899.

DECIDED : August 24, 1899.

Motion for an order for the issue of a writ of habeas

corpus directed to the keeper of the common gaol of the county of Carleton to have the body of the applicant, Charles H. Askwith, before the Court and for the issue of a writ of certiorari in aid, and for his discharge from custody. The said Charles H. Askwith had been committed by a police magistrate for having refused to answer certain questions as a witness in a prosecution of one Delorme for an offence under the Ontario Liquor License Act. It was contended that if the applicant answered the questions put to him, the answers would tend to criminate him and that he was not therefore bound to answer them.

The Liquor License Act, R.S.O. 1897, c. 245, provides as follows :—

54.—(1) In every place where intoxicating liquors are authorized to be sold by wholesale or retail, no sale or other disposal of such liquors shall take place therein, or on the premises thereof, or out of or from the same, to any person or persons whomsoever, from or after the hour of seven of the clock on Saturday night till six of the clock on Monday morning thereafter, and during any further time on the said days, or any hours or other days during which, by any statute in force in this Province, or by any by-law, or any resolution of the board of license commissioners of the license district in force in the municipality wherein such place is situated, the same, or the bar-room or bar-rooms thereof, ought to be kept closed, save and except in cases where a requisition for medical purposes, signed by a licensed medical practitioner, or by a Justice of the Peace, is provided by the vendee or his agent ; nor shall any such liquor, whether sold or not, be permitted or allowed to be drunk in any such place during the time prohibited for the sale of the same, except by the occupant or some member of his family, or lodger in his house.

57.—Any person so found in such bar-room, or who has been present during the prohibited hours, in the preceding section mentioned, and who does not come within the exceptions and proviso in that section contained, shall be guilty of an offence under this Act, and upon conviction thereof shall

be liable to a penalty for each offence of not more than \$10 and not less than \$2 with costs, and in default of payment thereof the defendant may be imprisoned for a period not exceeding thirty days.

59.—(1) Every person, not being the occupant or a member of his family or lodger in his house, who buys or obtains, or attempts to buy or obtain intoxicating liquor during the time prohibited by this Act for the sale thereof, in any place where the same is or may be sold by wholesale or retail, shall be guilty of an offence under this Act, and shall be liable to a penalty for each offence of not more than \$10 and not less than \$2 besides costs.

(2) Notwithstanding anything in this Act contained, any Police Magistrate or Justice of the Peace before whom any information or complaint is laid or made for the prosecution of any offence against the provisions of subsection 1 of section 54 may, having regard to the demeanour of any witness and his mode of giving his evidence, by certificate in that behalf exempt such witness from the operation of subsection 1 of this section and from all proceedings and penalties thereunder in respect of the subject matter of such information or complaint.

115.—In any prosecution under this Act the Justice, Justices, or Police Magistrate trying the case may summon any person represented to him or them as a material witness in relation thereto ; and if such person refuses or neglects to attend pursuance to such summons, the Justice, Justices, or Police Magistrate may issue his or their warrant for the arrest of such person ; and he shall thereupon be brought before the Justice, Justices, or Police Magistrate, and if he refuses to be sworn or to affirm, or to answer any question touching the case, he may be committed to the common gaol of the county, there to remain until he consents to be sworn or to affirm and to answer.

The motion was argued at the Weekly Court at Ottawa on June 17th, 1899.

*George F. Henderson*, for the applicant.

*Glyn Osler*, for the Police Magistrate.

*R. J. Sims*, for the License Inspector.

The following statutes and authorities were cited : The Liquor License Act, R. S. O. ch. 245, secs. 57, 59 and 115 ; The Ontario Election Act, R. S. O. ch. 9, sec. 189 ; The Evidence Act, R. S. O. ch. 73, secs. 5 and 9 ; Taylor on Evidence, Bl. ed., sec. 1453, p. 1242 ; Endlish on the Interpretation of Statutes, sec. 127 ; Maxwell's Interpretation of Statutes, 3rd ed., 399 et seq. ; *Regina v. Fee* (1887), 13 Ont. R. 590 ; *The Queen v. Nurse* (1898), 2 Can. Crim. Cas. 57.

TORONTO, August 24, 1899.

FALCONBRIDGE, J.—

One Michel Delorme was charged before the late Martin O'Gara, Esquire, Q.C., police magistrate, in and for the city of Ottawa, with selling liquor on Sunday, 21st May, 1899, in his hotel in Ottawa, and the applicant was summoned to appear as a witness on behalf of the prosecution.

The applicant was called on the 10th of June as a witness, duly sworn, and said (as appears by the police magistrate's certificate) :

" I was subpoenaed as a witness in this case." Q. " Were you at the defendant's hotel in the city of Ottawa on Sunday, the 21st of May last ?" A. " I refuse to answer on the ground that the answer might tend to incriminate me."

Proceedings were then enlarged until the 13th of June when the learned magistrate again submitted the question to the applicant, and the applicant again declined to answer on the same ground ; whereupon the magistrate " adjudged the applicant to be committed to the common gaol of the county of Carleton, there to remain until he consents to answer the said question."

The applicant files an affidavit setting out the facts and stating :



"I am satisfied that if an answer is given by me to the said question so asked in the said proceedings, such answer would tend to subject me to prosecution for a penalty under the provisions of the said Liquor License Act."

Since said committal and pending the result of this motion, the applicant has been only nominally in custody.

The matter comes before me on motion for a writ of habeas corpus, and by request and consent of all parties I am to deal with it finally in the first instance.

If the applicant had the right to maintain and rely on his objection, it is quite clear that the objection was sufficiently taken, and I am also clearly of the opinion under the circumstances that his objection is likely to be well founded, for by sec. 57 of the Liquor License Act, it is an offence (with certain exceptions) to be found in a bar-room during prohibited hours. Therefore his declaration on oath before the magistrate, repeated in his affidavit, that he believes the answer will tend to criminate him will protect him from answering unless, as is contended by the prosecution, the language of sec. 115 of the Liquor License Act is of force sufficient to abrogate a rule of great antiquity, and which rule has been universally recognized by all British Courts whether exercising civil or criminal jurisdiction. [The learned Judge here quotes that section].

Any statute which appears to take away, change or diminish a common law right should be strictly construed: Endlich on the Interpretation of Statutes, sec. 127; Maxwell's Interpretations of Statutes, 3rd ed., 399.

Under the Evidence Act, R. S. O. ch. 73, there seems to be no escape for the defendant or his or her wife or husband: *Regina v. Fee* (1887), 13 Ont. R. 590; *The Queen v. Nurse* (1898), 2 Can. Crim. Cas. 57, where the learned senior Judge of the county of York discusses the subject fully and expresses the opinion that, "Any other witness except the defendant, his wife or husband (as the case may be), can, however, avail himself of the protection afforded by sec. 5 of the Evidence Act (Ont.), and if the answer to the question

would tend to subject him—the witness—to criminal proceedings, or to a prosecution for a penalty, he can decline to answer."

With this opinion I agree. The refusal "to answer any question touching the case" in section 115, must mean any question which may be lawfully put and which the witness is otherwise bound to answer. It is suggested that without the aid of the section the magistrate might not be able to enforce the answering of proper questions. Having come to this conclusion, it is unnecessary further to consider or criticise section 115, but does it authorize the committal of a witness for refusal to be sworn or to answer until after he has been brought before the justice on a warrant for refusing to attend pursuant to summons? Here he attended in obedience to the summons.

There will be an order for the discharge of Charles H. Askwith from the common gaol of the county of Carleton, or from the custody of such other person as may have him in charge. No order as to costs as none were asked for by or against the magistrate.

*Order for discharge.*

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., TOWNSHEND, J., GRAHAM, E.J.,  
AND MEAGHER, J.

## THE QUEEN v. HORTON.

*Penalty—Summary conviction for unlawfully killing a dog—  
Adjudication of imprisonment with hard labor in default  
of paying fine and compensation—Imprisonment 'in the  
manner and for the time' authorised—Power to award  
hard labor in the first instance—Habeas corpus—Imposing  
terms on ordering discharge—Cr. Code 501, 872, 955.*

1. Criminal Code sec. 872 enacting that in default of payment of a fine the defendant may be imprisoned "in the manner and for the time" mentioned in the Act or law authorizing the conviction, does not authorize an award of imprisonment *with hard labor* in default of payment of the fine, unless the Act or law under which the conviction is had provides the same in respect of the non-payment of the penalty; and this notwithstanding such Act or law authorizes a punishment in the first instance by imprisonment with hard labor.
2. A conviction made under Cr. Code sec. 501 for wilfully and unlawfully killing a dog, and which adjudges a penalty and compensation and costs, and in default of payment imprisonment with hard labor, is bad, and the accused taken into custody thereunder is entitled to be discharged upon habeas corpus.
3. The court may as a condition to a prisoner's discharge impose the term that he shall undertake that no action shall be brought by him against any person in respect of the prosecution and conviction or of his imprisonment thereunder.

ARGUED : December 10, 1897.

DECIDED : December 13, 1897.

This was a case stated for the opinion of the court by Meagher, J., as follows :—

The present motion came before me upon a summons for a habeas corpus to discharge the defendant from custody.

He was convicted under s. 501 of the Criminal Code of the offence of wilfully and unlawfully killing a dog, the property of one Alonzo Wallace, and was adjudged to forfeit and pay \$10 for the offence, \$30 to Wallace as compensation, and \$16 for costs, and, in default of payment forthwith, to

be imprisoned in the jail at Windsor for three months with hard labor.

Section 501 authorizes the imposition of a penalty, and in addition compensation for the injury, or imprisonment for three months, with or without hard labor, but it does not make any provision for enforcing the penalty when a penalty and not absolute imprisonment is imposed.

Section 955, sub-sec. 6, provides that imprisonment in a common jail or public prison, other than certain specified ones, shall be with or without hard labor in the discretion of the court or person passing sentence, if the offence is convicted on indictment, or under the provisions of parts 54 or 55, or before a judge of the Supreme Court of the Northwest Territories, and, in other cases, may be with hard labor, if hard labor is part of the punishment for the offence of which such offender is convicted. Section 501 is not within either of the parts of the Code referred to above.

By s. 872, it is provided that :—

“ Whenever a conviction adjudges a pecuniary penalty or compensation to be paid . . . . whether the Act or law authorizing such conviction, . . . . does or does not provide a mode of raising or levying the penalty, compensation or sum of money, or of enforcing the payment thereof, the justice, by his conviction . . . . after adjudging payment of such penalty, compensation or sum of money, with or without costs, may order and adjudge—

(b) That, in default of payment of the said penalty, compensation or sum of money, and costs, if any, forthwith, or within a limited time, the defendant be imprisoned in the common jail . . . . in the manner, and for the time mentioned in the said Act or law, or for any period not exceeding three months, if the Act or law authorizing the conviction . . . . does not specify imprisonment, or does not specify any term of imprisonment, unless the said sum, with the like costs and expenses are sooner paid.”

There are two English cases on the subject, namely *Regina v. The Justices of Tynemouth*, 16 Q.B.D., 747, and

*Regina v. Turnbull*, 16 Cox C.C., 110. They are reviewed in the Law Times Journal, vol. 82, p. 64.

The section upon which the conviction proceeded in these cases was, so far as the present question is concerned, identical terms.

The section of the English Act which was considered in these cases, in addition to the one on which the conviction was founded, was s. 8 of the English Summary Jurisdiction Act, 1879, which enacted that "the period of imprisonment imposed by a court of summary jurisdiction, under this Act, or under any other Act, whether past or future, in respect of the non-payment of any sums of money adjudged to be paid by a conviction, or in respect of the default of a sufficient distress to satisfy any such sum shall . . . be without hard labor, except where hard labor is authorized by the Act on which the conviction is founded, in which case the imprisonment may, if the court thinks the justice of the case requires it be with hard labor, so that the term of hard labor awarded, do not exceed the term authorized by the Act."

Other points were raised in this case, but they were successfully met either on the facts or on the law.

Having considerable doubts as to the validity of the warrant, and conviction, so far as it imposed hard labor, as a means of enforcing payment of the penalty imposed, I decided to refer the case to the court, so that an authoritative decision may be had. See the English practice where doubts exist : Short & Mellor, 359.

The sections requiring discussion in this case, viz., 872 and 955 are general, and apply to many cases besides the present. There may be other sections which bear upon the subject, but I have not seen them.

HALIFAX, December 10, 1897.

*J. J. Power* for prisoner, in support of motion : The conviction was bad under s. 501 of the Crim. Code. Section 872, ss. (b), is the provision for collecting the fine. Section 955, ss. 6. This is a case where the Act or law providing the

penalty does not authorize imprisonment with hard labor in default of payment of the fine. The punishments provided in sec. 501 are alternative punishments. *In re Clew*, 51 L.J. M.C., 140; *The Queen v. Turnbull*, 16 Cox C.C. 110; *Ex parte Goodine*, 25 N.B.R. 153; Crim. Code of Canada, secs. 106, 393 and 333, 103, 118, 119-199, 390-486. It is to cases under such sections as these that the words for "the time and in the manner" refer. Under s. 501, there can be no costs of conveying to jail.

*J. F. Frame* for complainant, contra: Section 872. The words "in the manner" are referable to that part of sec. 501, which provides for imprisonment with hard labor. *Regina v. Justices of Tynemouth*, 16 Cox C.C. 74; Paley on Convictions, 277. The form given in the statute has been followed; statutory form FFF. Before the Code this conviction would have been good. R.S.C., c. 178, s. 68; Crim. Code, s. 951, ss. 2.

*J. J. Power* in reply referred to 82 L.T.J., 64.

HALIFAX, December 13, 1897.

GRAHAM, E.J., delivered the judgment of the court as follows :—

This is an application for a discharge upon habeas corpus. The defendant was found guilty under the Crim. Code, sec. 501, of wilfully, etc., killing a dog. That section provides that the guilty person shall be liable, (1) to a penalty not exceeding \$100, etc., or (2) to 3 months imprisonment absolute, with or without hard labor. But he is not, under that section, liable to both, or to the latter in default of payment of the former. That section does not specify, as many sections do, what imprisonment the justice may impose, in default of the pecuniary penalty, in order to enforce payment. When the justice comes to make the conviction, and provide for the enforcement of the money penalty, he must look elsewhere.

Section 872, sub-sec. (b) deals with this matter, namely,

the limits and manner of imprisonment which may be imposed "in default of payment of the penalty." There are two branches: First, if the provision, for the breach of which the defendant is summoned, specifies the manner and limit of imprisonment which may be imposed, then the justice is guided by that; and second, if he does not, then this sub-section itself supplies the guide, namely, it provides that the imprisonment is not to exceed three months. In my opinion, this case comes under the first branch, that is to say, section 501 does not specify "imprisonment or the term of imprisonment," *i.e.*, which is to follow in default of payment of the penalty.

It was contended, that because section 501 does enable a fixed term of imprisonment absolute, with or without hard labor to be imposed, then under the letter of sub-section (b), a fixed term with hard labor could be imposed in default of payment of the penalty, — that this term of absolute punishment is a specification of the manner and time of imprisonment.

But, there are numerous provisions, which prescribe what limit and manner of imprisonment may be imposed in default of payment of the penalty, and this branch of sub-section (b) has abundant scope for application in respect to such cases. It is extending it a great deal, to make it apply to such a section as this, which provides for a sentence of a term of imprisonment by way of punishment.

Then, if the provision for imprisonment is to be found in sub-section (b), the limit is three months, but hard labor is not provided for.

And, as this defendant was adjudged to pay a penalty of \$10, etc., and, in default of payment forthwith, to be imprisoned for three months with hard labor, the conviction is bad. The case of *Reg. v. Turnbull*, 16 Cox C.C. 110, applies. A writ of habeas corpus may issue, and the defendant, Horton, be discharged upon the terms of an undertaking that no action shall be brought by him against any person in respect to the proceedings taken against him, which resulted in, or followed upon, said conviction, or in

respect to said conviction, or his arrest, detention, commitment or imprisonment, or, of any other matter which happened to him by reason of the proceedings in the prosecution. No costs.

*Conviction quashed.*

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[COURT OF QUEEN'S BENCH, QUEBEC.]

BEFORE OUIMET, J.

**THE QUEEN v. BRAZEAU.**

*Libel—Plea of Justification—Motion for dismissal of plea—  
Publication in the public interest—Cr. Code 634.*

1. In a prosecution for an alleged defamatory libel contained in a newspaper article, condemning an employer's dismissal of employees belonging to a trade union and charging that the distribution of certain gratuities by the employer to his employees was impelled by motives of selfishness on his part and was for the purpose of winning public approval and favorable public comment through press notices thereof, a plea of justification will not be struck out on the objection that the facts therein alleged do not show that it was for the public benefit that the publication should be made, if such plea contains a charge that the press notices favorable to the complainant were published at his instance.
2. If the complainant in a prosecution for defamatory libel has himself called public attention to the subject matter of the alleged libel by obtaining the publication of newspaper articles commending his conduct therein, he thereby invites public criticism thereof and cannot object that the answer to his own articles is not a publication in the public interest.

MONTREAL, September 18, 1899.

OUIMET, J.—

The defendant is charged with the publication of a defamatory libel against one J. M. Fortier; such libel was contained in an editorial article and several paragraphs of a paper published in Montreal in January, 1899, called "Canada's Democracy." The incriminated editorial is headed "Fortier humbugs his employees—Cuts wages and gives turkeys in return." I gather from the editorial that



Fortier is a large manufacturer of cigars. Sometime during last fall, he closed his factory and discharged all his employees. A few days later he notified them that they could resume work, but with reduced wages. A number of them refused to accept, to work at what they called starvation wages. The cigar makers' union, a Trades Union duly incorporated, of which a number of Fortier's dismissed employees were members, interfered on their behalf and demanded the submission of the dispute to arbitrators. Fortier did not even acknowledge the receipt of the letter.

At New Year, Fortier caused a gratuitous distribution of over a hundred turkeys to be made amongst his employees. That act of generosity was duly recorded in the daily press of the city; and its author much complimented. Fortier was exalted as a great philanthropist and he was highly congratulated for his kindness and liberality towards his employees.

The above reduction, the editorial goes on, means a saving to Fortier of \$1 or \$2 a week on the already low wages of each of his employees. "How many of you," it adds, "would like to be presented once a year with a turkey which would cost you \$50 to \$100?"

The whole article seems to be an answer to the previous comments of the press, as well as an appeal to the public for support in the struggle of the Union and of their dismissed members against Fortier, whose cigars the friends of the working men are requested to cease purchasing.

The defendant, to a plea of not guilty, has added a plea of justification. In this he alleges that it was Fortier himself that caused the publication of those articles exalting his philanthropy and his generosity toward his employees, and that it was in the public interest that a true version be published of the relations of Fortier with his employees and especially with those members of the Union whom he had dismissed.

By a first motion complainant Fortier prays for the dismissal of the whole plea of justification on the ground that the facts set forth do not show that the public interest could be served by publishing the incriminated article.

If it is true, as alleged by the defendant in his plea of justification, and the Court at this stage of the proceedings is bound to admit this allegation as true, that Fortier himself caused the publication of the several articles in the daily press signalizing his great liberality towards his employees, in order to win to himself admiration and public sympathy thereby in his fight against the Union and its members, it seems to me that the Union and the defendant were quite justified in resorting to publicity for the purpose of their own defence. In placing himself before the public as a public benefactor and a model master, the complainant has provoked criticism as well as admiration. If the criticism is proved to be unfair, malicious and founded on false representations, his vindication will be the more complete. If on the contrary it be fair and reasonable, and founded on a statement of facts substantially true, the complainant will have to bear with it. Odger (on Libel, 3rd ed., page 56) says :—"Whoever seeks notoriety or invites public attention is said to challenge public criticism, and he cannot resort to the law courts if that criticism is less favorable than he anticipated." (See cases cited).

I shall therefore dismiss the motion leaving the parties to prove before the jury the truth of their respective allegations. If the defendant does not prove that the complainant himself caused the publication of the articles that have provoked the answer and criticism of which he now complains, another question, a larger one, will have to be decided by the learned judge then presiding over the court, viz.:—"When a trade Union for the sake and protection of itself and of its members has undertaken a legitimate fight against a large employer of labor, is it justifiable to resort to publicity in order to fairly lay its case before the public and enlist their sympathies and assistance?" I am not called upon to decide this question now.

In this same case a second motion was made by the complainant to strike off paragraphs 7 and 10 of the plea of justification on the ground that the facts as set up therein are not mentioned in the bill of particulars as a matter of

reproach to defendant. I find that these facts as alleged are contained in the articles complained of, and for the same reason above stated the defendant will be allowed to put them in evidence before the jury.

Similar motions have been made in another case, *The Queen v. Raby*. In this case the libel, the publication of which is complained of is contained in a printed circular substantially similar as to the facts stated therein to those published in the newspaper "Canada's Democracy," and for the same reasons these two motions are dismissed.

*Motions dismissed.*

*Desmarais*, Q.C., for the prosecution.

*Saint-Pierre*, Q.C., for the defendant.

**Note:** *Criminal libel—Publication in the public interest—Justification.*

"Wherever a man calls public attention to his own grievances or those of his class, whether by letters in a newspaper, by speeches at public meetings, or by the publication of pamphlets, he must expect to have his assertions challenged, the existence of his grievances denied, and himself ridiculed and assailed." Odgers on Libel, 3rd ed., 57; *Odger v. Mortimer*, 28 Eng. L.T. 472; *Kæinig v. Ritchie*, 3 F. & F. 413; *R. v. Veley*, 4 F. & F. 1117; *O'Donoghue v. Hussey*, Ir. R. 5 C.L. 124; *Dwyer v. Esmonde*, 2 L.R. Ir. 243.

But where the defendant, in answering a letter which the plaintiff had sent to the paper, does not confine himself to rebutting the plaintiff's assertions, but retorts upon the plaintiff by inquiring into his antecedents, and indulging in other uncalled-for personalities, the defendant will be held liable, for such imputations are neither a proper answer to nor a fair comment on the plaintiff's speech or letter. *Murphy v. Halpin*, Ir. R. 8 C.L. 127.

Comments, however severe, on the advertisements or

**Note—Continued.**

handbills of a tradesman will not be libellous, if the jury find that they are fair and temperate comments not wholly undeserved, on a matter to which public attention was expressly invited by the plaintiff. *Paris v. Levy*, 9 C.B.N.S. 342 ; *Morrison v. Harmer*, 3 Bing. N.C. 759, 4 Scott 524.

*What are matters of public interest.*

Matters of public interest may be classified as follows:—

## 1. Affairs of State.

Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander. *Parmiter v. Coupland*, 6 M. & W. 108 ; *Seymour v. Butterworth*, 3 F. & F. 376 ; *Kelly v. Sherlock*, L.R. 1 Q.B. 689.

## 2. The administration of justice.

## 3. Public institutions and local authorities.

## 4. Ecclesiastic matters.

## 5. Books, pictures and architecture.

## 6. Theatres, concerts and other public entertainments.

## 7. Other appeals to the public.

A man who has commenced a newspaper warfare cannot complain if he gets the worst of it ; but if such answer goes further, and touches on fresh matter in no way connected with the plaintiff's original letter, or unnecessarily assails the plaintiff's private character, then it ceases to be an answer ; it becomes a counter-charge, and, if defamatory, will be deemed a libel. And, generally, when a man puts himself prominently forward in any way, and acquires for a time a *quasi-public* position, he cannot escape the necessary consequence—the free expression of public opinion. Odgers on Libel, 1896, 3rd ed., p. 56.

It is a question for the judge, and not for the jury, whether a particular topic was or was not a matter of public interest. *Weldon v. Johnson* (1884), per Coleridge, C.J., cited in Odgers on Libel, 3rd ed., page 46.

**Note—Continued.**

It has been held that the sanitary condition of a large number of cottages let by the proprietors of a colliery to their workmen is a matter of public interest. *South Hetton Coal Co. v. N.E. News Association* (1894) 1 Q.B. 133 (C.A.).

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[SUPREME COURT OF NEW BRUNSWICK.]

**Ex parte WHITE.**

*Information—Canada Temperance Act, R.S.C. 1886, c. 106—  
Insufficiency of information before one justice of the peace  
—Cr. Code 842.*

1. Notwithstanding section 842 of the Criminal Code, where a prosecution for an offence under the Canada Temperance Act is to be proceeded with before two justices of the peace, the information must be laid before two justices.

ARGUED : November 4, 1897.

DECIDED : November 12, 1897.

A rule nisi for certiorari was granted by Mr. Justice Van Wart, to remove a conviction for selling liquor contrary to the provisions of the second part of the Canada Temperance Act on the ground that the information was laid before only one justice of the peace.

*W. Wilson* shewed cause.

*McCready* supported the order.

FREDERICTON, N.B., November 12, 1897.

The judgment of the court was delivered by

VANWART, J.—

The applicant seeks to remove into this court by certiorari, a conviction made against him by and before two justices of the peace for York County, for a violation of the second part

of the Canada Temperance Act, with a view to having the conviction quashed.

The ground of the application is that the information was laid before one justice.

It was asserted on the argument and contended that sub-sections 3 and 6 of section 842 of the Criminal Code have so altered the law that the decision in *ex parte Sprague*, 31 N.B. R. 236, is no longer applicable. An examination, however, discloses that sub-section 3 is a verbatim re-enactment of section 6 of chapter 178 of the Revised Statutes of Canada, 1886, and sub-section 6 a verbatim re-enactment of section 9 of the same chapter, both of which sections were in force when *ex parte Sprague* was decided.

The case is, therefore, exactly in point, and must prevail, and the rule in consequence should be made absolute.

*Rule absolute.*

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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE THE HONORABLE JOHN ALEXANDER BOYD, CHANCELLOR,  
THE HONORABLE MR. JUSTICE ROBERTSON, AND THE  
HONORABLE MR. JUSTICE MEREDITH, SITTING AS A  
COURT OF APPEAL FOR CROWN CASES RESERVED.

**THE QUEEN v. ELLIOTT.**

*Confession—Interrogation by police officer of accused in custody  
—Evidence—Admissibility of answers—Answers not unduly  
or improperly obtained.*

1. Admissions made by a prisoner to a police officer in respect of the charge upon which he is in custody, are admissible in evidence although made in response to questions put by the officer, if the trial judge finds that the answers were not unduly or improperly obtained having regard to the circumstances of the particular case.

ARGUED : June 12, 1899.

DECIDED : June 22, 1899.

The following case was reserved by MACMAHON, J., for the opinion of a Court of Criminal Appeal :—

"The prisoner was tried before me at the Sittings of the Court of Oyer and Terminer for the County of Ontario on the 23rd of May, 1899, on an indictment charging him with having on the 12th of November, 1898, at the village of Beaverton, in the said county, murdered one William Murray. The jury found the prisoner guilty.

"Murray was living alone and was murdered in his house. The person who committed the crime, after its commission on leaving the house locked the door forming the only means of ingress and egress to and from the house, and carried off the key. The prisoner was arrested on the night of Tuesday, November 15th, by Constable Smith, who placed him in the lock-up at Beaverton, and, when doing so, warned him against saying anything that would criminate him, as, if he did, it might be used in evidence against him. On the following morning (Wednesday) Smith asked the prisoner where he had put the key. The prisoner, in reply, asked: 'What key?' Smith then said: 'The key of Murray's house.' The prisoner thereupon said: 'You could not get it anyway; you could not get your hand in where it is under the sidewalk.' Smith then said to him: 'You come and get it.' As Smith and the prisoner were going to the place in the sidewalk referred to by the prisoner, they were joined by Duncan McMillan, the reeve of Beaverton, who had been assisting Constable Smith in his investigations, and who went with them. McMillan, who was undoubtedly a person in authority, warned the prisoner with a like warning to that given by Smith on the previous evening. While Smith and McMillan were returning to the lock-up, McMillan said to the prisoner: 'What a terrible thing it was to kill a poor old man.' The prisoner replied: 'He' (meaning Murray) 'said my sister was a bitch, and I hit him with a poker. I hit him two or three times with a stick of wood.' Smith, in giving his account of that conversation, stated that after McMillan had asked the question, and the prisoner had replied that Murray had called his sister a bitch, he (Smith) may have asked did he hit him with the poker. On Thursday, the 17th, while the prisoner was in the lock-up,

McMillan asked him if Murray had died easy, to which the prisoner replied: "Yes, he was dead when I left." Prisoner also stated on that occasion that McHattie had left Murray's house before he did. McMillan warned the prisoner before asking the question. On the same day in the lock-up, Smith said to the prisoner: 'What did you do with the purse?' (referring to Murray's purse), to which the prisoner replied that it was under the bureau in his father's house. The prisoner was given the usual warning by Smith prior to this question being asked.

"The statements or confessions made by the prisoner to Smith and McMillan, and the replies given by the prisoner to the questions asked by his father, were all voluntarily made, and were not made through the influence of hope or fear, exercised by anyone in authority. Acting on the authority of *Regina v. Thompson* (1893), 2 Q.B. 12; *S.C.*, 17 Cox 641; *Regina v. Miller* (1895), 18 Cox 54; and *Regina v. Day* (1890), 20 Ont. R. 209, I admitted the evidence above referred to. But as *Regina v. Male and Cooper* (1893), 17 Cox 689, is, as I regard it, at variance with *Regina v. Day*, I reserved for the consideration of the Court for Crown Cases Reserved the question whether the different statements made by the prisoner above referred to, were, under the circumstances, receivable in evidence against him on his trial."

TORONTO, June 12, 1899.

*T. E. Godson*, for the prisoner: The accused was not sufficiently cautioned; there was no right to interrogate him while in custody: *Regina v. Male and Cooper* (1893), 17 Cox 689; *Regina v. Miller* (1895), 18 Cox 54; *Regina v. Gavin* (1885), 15 Cox 656; *Regina v. Toole* (1856), 7 Cox 244; the decision in *Regina v. Day* (1890), 20 Ont. R. 209, is not binding on this Court.

*J. R. Cartwright*, Q.C., for the Crown, referred to Joy on Confessions, p. 34; *Rex v. Thornton* (1824), 1 Moo. 27; *The Queen v. Johnston* (1864), 15 Ir. C.L. 60; *Regina v. Day* (1890), 20 Ont. R. 209; *Regina v. Brackenbury* (1893), 17 Cox 628.



TORONTO, June 22, 1899.

The judgment of the Court was delivered by

BOYD, C.—

As to statements made by persons accused while in custody in response to questions put by an officer in charge, the Judges have regarded the matter from three points of view. First, there are those who think the practice so reprehensible that any statements so obtained should not be given in evidence. Others think that while the practice of interrogation is undesirable and not to be encouraged, yet that the answers so obtained cannot be rejected as evidence. And still a third class hold that this investigation may be so conducted as to be useful and even desirable in the furtherance of justice. The great weight of authority is in support of the conclusion that answers given in response to the officer in charge are to be received as evidence so long as they are not evoked or extorted by inducements or threats. Upon the case referred, it is expressly stated that the replies were not obtained by any undue means, and that suffices to justify their reception as evidence. *Regina v. Day* (1890), 20 Ont.R. 209, is the case settling the law in this Province, and that has been followed with approval by a majority of the Judges in the Appellate Court in the Province of Quebec: *Regina v. Viau* (1898), 7 Que. Q. B. 362, 379. Since *Regina v. Day* the opinion of the Judges has continued to fluctuate in England. Thus in *Regina v. Brackenbury*, 17 Cox 628 (Feb., 1893), Mr. Justice Day received such evidence; but in *Regina v. Male and Cooper*, 17 Cox 689 (Dec., 1893), Mr. Justice Cave strongly denounced the method and refused to admit the statements. In the last case, that of *Regina v. Miller*, 18 Cox 54 (May, 1895), Mr. Justice Hawkins approves of proper interrogation, and says it is impossible to discover the facts of a crime without putting questions.

The general principle is that admissions made to the officer in charge, even in response to questions, may be received if the presiding Judge is satisfied that they were not unduly or improperly obtained, which depends upon the

circumstances of each case : see *Bram v. United States* (1897), 168 U.S. at p. 557 ; and Roscoe's Criminal Evidence, 12th ed., p. 44 ; and *Rogers v. Hawken* (1898), 33 Eng. L.J. 175.

In the present instance the statements were properly in evidence.

*Conviction affirmed.*

**Note :** *Confession—Admissions on interrogation by police officer, of accused person in custody.*

In *The Queen v. Day* (1890), 20 Ont. R. 209, the prisoner, who was charged with murder, had been first cautioned by the detectives against saying anything, and had then been questioned by them, and evidence of the statements made by him in answer to such questions was admitted at the trial before Rose, J., who reserved a case for the consideration of the Queen's Bench Division of the High Court (Armour, C.J., Falconbridge, and Street, JJ.). In delivering the judgment of the Court, Armour, C.J., said :—

“ We think, although we reprehend the practice of “ questioning prisoners, that we cannot come to the conclusion that evidence obtained by such questioning is “ inadmissible. The great weight of authority in England “ and Ireland, and all the cases in which the point has been “ considered by a Court for Crown cases reserved, go to “ shew that the evidence is admissible. We must leave it “ to the Legislature to determine whether the practice of “ cross-examining prisoners is legally to obtain hereafter. “ We hold the evidence admissible and affirm the conviction.”

*Regina v. Miller* (1895), 18 Cox C.C. 54, referred to in the judgment above reported, was a decision by Hawkins, J., at the Liverpool Assizes. It is important to observe, however, that Miller was not in custody at the time that the questions were put to him. The charge was one of murder, and evidence was given in support of the indictment, proving that a detective had called upon Miller and had said to him, “ I am going to ask you some questions on a very serious

**Note—Continued.**

matter, and you had better be careful how you answer." The detective had then questioned Miller as to all his movements on the night of the murder and on the following morning, and had asked him to produce his clothes, and when they were produced, to account for bloodstains upon them; and had, at the end of the conversation, taken the accused into custody upon the charge of murder. The prosecution then proposed to give evidence of the answers which were given by Miller to the questions asked him by the detective, and also to give evidence that subsequent inquiries which had been made tended to shew that the statements made by him in answer to the detective's questions were untrue. Counsel for the prisoner objected to the evidence being received, upon the authority of *R. v. Brackenbury* (1893), 17 Cox 628; *R. v. Thompson* (1893), 2 Q.B. 12; and *R. v. Male and Cooper* (1893), 17 Cox 689.

Hawkins, J., admitted the evidence, and held that no inducement was held out to the prisoner to make any admission, and no threat uttered or any duress exercised towards him, and that therefore his answers were admissible, and that they were voluntary statements which the prisoner was under no obligation to make; it was impossible to discover the facts of a crime without asking questions, and these questions were properly put. He did not express dissent from any of the cases cited for the prisoner, but every case must be decided according to the whole of its circumstances. The evidence to the effect that the prisoner's answers were untrue was also admitted, and the prisoner was found guilty.

In *R. v. Morgan* (1895), 59 J.P. 827, Mr. Justice Cave held that answers to questions by the police could not be given in evidence. He also ruled that where prisoners are taken into custody at their house, what they said, in answer to the charge at the police-station, could not be given in evidence against them, as it was not right, when once a

**Note—Continued.**

prisoner was in custody, to charge him again at the police-station in the hope of getting something out of him. 59 J.P. 827.

But where one of two prisoners in custody on a charge against them jointly, offers while in custody to make a statement, and voluntarily makes and signs a statement implicating the other, and such statement is read over to the prisoner implicated, and the latter, after being cautioned, makes a confession which is taken down in writing and is signed by him, such confession is a voluntary one and is admissible in evidence against the person making it. *R. v. Hirst* (1896), 18 Cox C.C. 374 (per Dugdale, Q.C., Special Commissioner at Manchester Assizes, after conferring with Cave, J.).

And see Note, vol. 1, Can. Cr. Cas. 398-401, and Note, vol. 2, Can. Cr. Cas. 150-153.

*Answers not unduly or improperly obtained—Onus upon prosecution.*

The onus of proving that admissions made by the accused were made voluntarily and without improper inducement or threats is upon the prosecution. *R. v. Thompson* (1893), 2 Q.B. 12; *R. v. Rose* (1898), 67 L.J.Q.B. 289, followed in *R. v. Jackson* (1898), 2 Can. Cr. Cas. 149, (Graham, J., of the Nova Scotia Supreme Court).

[COURT OF QUEEN'S BENCH, QUEBEC.]  
(CROWN SIDE.)

BEFORE WURTELE, J.

**THE QUEEN v. WEIR. (No. 1).**

*Bank Act (Can.)—Officer making false bank return—Indictment—Form of—Sufficiency.—Cr. Code 611.*

1. An indictment is sufficient in form if it contains all the allegations essential to constitute the offence and charges in substance the offence created by the statute; and it is immaterial in what part of the same the averment is contained, or that words of equivalent import are used instead of the language of the statute.
2. An indictment charging bank officials with having made a monthly report, etc., "a wilful, false and deceptive statement" of and concerning the affairs of the Bank, with intent to deceive, sufficiently charges the offence, under section 99 of *The Bank Act*, of having made "a wilfully false or deceptive statement in any return or report" with such intent.

DECIDED : November 9, 1899.

The defendants, William Weir, Frederick Smith and Ferdinand Lemieux, were jointly indicted at the November term of the court, for the offence of making a false return under *The Bank Act of Canada*, 53 Vict. cap. 31, sections 85 and 99.

The indictment was in the following form :—

DISTRICT OF MONTREAL }  
To wit :

"The jurors of Our Lady, The Queen, upon their oath  
"present, that heretofore to wit, on the eleventh day of  
"July, in the year of Our Lord, one thousand eight hundred  
"and ninety-nine, William Weir was president of a certain  
"Bank, to wit, "La Banque Ville-Marie" duly incorporated;  
"that Frederick W. Smith was a director of the said "La  
"Banque Ville-Marie," and that Ferdinand Lemieux was an  
"officer, to wit, the chief accountant of the said "La Banque  
"Ville-Marie," and further that the said William Weir,  
"Frederick W. Smith and Ferdinand Lemieux, on the said

"eleventh day of July, in the year aforesaid, at the City of Montreal, in the District of Montreal, did unlawfully make, sign, approve of, and concur in a monthly report of and concerning the affairs of the said "La Banque Ville-Marie," made and sent by them to the Honorable, the Minister of Finance and Receiver General, to wit, The Honorable W. S. Fielding, and received by him, a wilful, false and deceptive statement of and concerning the affairs of the said "La Banque Ville-Marie," with intent thereby then, to deceive and mislead the public in general, and more particularly the Honorable The Minister of Finance and Receiver General, to wit, the said The Honorable W. S. Fielding, as aforesaid."

Each of the defendants demurred to the indictment, the demurrer filed by the defendant Weir being in the following form :—

"And the said William Weir in his own proper person cometh into Court here and having heard the said indictment read, saith, that the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, do not disclose an indictable offence, and are not sufficient in law, and that he, the said William Weir, is not bound by the law of the land to answer the same; and this he is ready to verify; wherefore, for want of a sufficient indictment in his behalf, the said William Weir prays judgment, and that by the Court he may be dismissed and discharged from the said premises in the said indictment specified."

The following answer to Weir's demurrer was filed by the Crown Prosecutor :—

"For answer to the demurrer to indictment in this case made on behalf of William Weir, without admitting the right of the accused to plead separately the Crown saith : that the said demurrer is unfounded and that the said indictment and the matters therein contained, disclose an indictable offence and are sufficient in law, and that the said William Weir is bound by the law of the land to

"answer the same : Wherefore, the said demurrer should  
"be dismissed."

Similar demurrers and answers were filed with regard to the other defendants.

MONTREAL, November 9, 1899.

WURTELE, J.—

The defendants have been indicted for a violation of sections 85 and 99 of "The Bank Act," being the Statute of the Parliament of Canada, 53 Vict., ch. 31; and, on being arraigned, they severally demurred to the indictment on the ground that the facts stated in it, show no indictable offence. Issue has been joined on the demurrers, and having heard the Counsel for the defendants and the Crown Prosecutors, I will now proceed to render judgment in the matter.

Section 85 requires all incorporated banks to make monthly returns to the Minister of Finance and Receiver General within the first fifteen days of each month, exhibiting and showing the financial position or condition of the bank on the last juridical day of the previous month, to be signed by the chief accountant, by the president, vice-president or the director then acting as president, and by the manager, cashier or other principal officer of the bank at its chief place of business; and section 99 declares that the making of any wilfully false or deceptive statement in any return or report respecting the affairs of the bank is a misdemeanor punishable by imprisonment for a term not exceeding five years, and that every president, vice-president, director, manager, cashier or other officer of the bank, who prepares, signs, approves or concurs in any such statement, return or report or uses the same, with intent to deceive or mislead any person, shall be held to have wilfully made such false statement.

The monthly returns of the financial condition of banks are required in the interest of the public, in order that people may form an opinion as to whether deposits may be safely made in them, or whether it is prudent to buy or hold their shares. It is, therefore, imperative that such monthly

returns should represent truthfully the actual financial position of the bank to which they relate, and consequently the making of a false or deceptive statement is made a statutory offence, for which a severe punishment is decreed.

The defendants are accused of having made on the 11th day of July last (1899), a wilful, false and deceptive monthly report or statement of the affairs of the Ville Marie Bank, and of having sent it to the Minister of Finance and Receiver General, the Hon. W. S. Fielding, with intent to deceive and mislead the public in general, and more particularly the Minister of Finance and Receiver General. The defendants, by their demurrers, contend that the matters contained in the indictment do not disclose any indictable offence, and in their argument, they say that the indictment charges them with having made a false and deceptive monthly return or report respecting the affairs of the bank, but that it does not charge them with having made a wilfully false or deceptive statement respecting the affairs of the bank, in such monthly return or report. They maintain that to make and send a monthly return or report, as alleged and set forth in the indictment, is no offence, and that the gist of the offence created by section 99 is the making and inserting of a wilful, false and deceptive statement respecting the affairs of the bank in a monthly return or report, or other document; and that as the indictment does not charge them with having made and inserted a wilful, false and deceptive statement *in* the monthly report which is mentioned as having been made and sent, the indictment shows no offence on its face, and is therefore bad.

The offence created by section 99 of "The Bank Act" is in plain language the making of a wilfully untrue representation of the position of a bank, with intent to deceive and mislead any person. Any such representation is a false and deceptive statement, and a return or report containing such a false and deceptive representation is a false and deceptive return or report, and a false and deceptive statement of the affairs of the bank. The phrase "the making of any wilfully false or deceptive statement in any account, statement,



"return or report," evidently and clearly means the making of a false or deceptive representation of the affairs of the bank in any statement, return or report, and any such statement, return or report which contains a false and deceptive representation is a false and deceptive statement, return or report. In plain and simple common sense, it is evident and clear that this is the meaning and intention of the enactment. It is therefore immaterial whether an accusation be of having made a false statement in a return or report, or whether it be of having made a false or deceptive return or report, in order to bring the accusation under the purview of section 99 of "The Bank Act." The tendency of our present jurisprudence is to overlook technicalities ; and to take any other view than that which I have indicated, would be, in my opinion, a mere play on words, and would allow a pure technicality to over-ride the evident intention of the statute.

The statement of an offence in an indictment must set forth all the facts and circumstances essential to constitute it, and they must be given with sufficient certainty to notify the Defendant and the Court of the nature of the offence charged, and to enable the Defendant to perceive what is the charge which he has to meet. Our Criminal Code, in article 611, lays down this rule, and declares that the statement of the offence may be in any words sufficient to give the accused notice of the offence with which he is charged. When this object has been attained the indictment is sufficient. When an indictment contains all the essential allegations, and is therefore sufficient, it is immaterial in what part a necessary averment is made. Although every ingredient of an offence created by a statute must be set out, it is not necessary to use its exact language ; words of equivalent import are sufficient, and it is enough to charge in substance the offence created by the statute. Clerical errors or bad grammatical construction will not make an indictment bad when the meaning is apparent. If any essential ingredient of the offence is omitted or is not stated with sufficient certainty, the defendant may move to quash the indictment, or may demur, and object that in point of law the facts and circum-

stances alleged in the indictment do not constitute an indictable offence.

I have now to examine the indictment and to see whether it contains a statement of all the facts and circumstances which are essential to constitute the offence created by section 99 of "The Bank Act." It states, in the first place, that on the 11th day of July last (1899), the defendants were officials of the Ville Marie Bank from among those whose duty it was to make the monthly returns; then, that on the same day, at the City of Montreal, they unlawfully made and sent to the Minister of Finance and Receiver General a monthly report of and concerning the affairs of the Bank, adding, by way of paraphrase, to characterize the term "monthly report" the words "a wilful, false and deceptive statement of and concerning the affairs of the said Bank," and finally, that such monthly report was made with intent to deceive and mislead.

The language used is certainly ungrammatical, and the drafting or wording of the indictment is faulty in construction, but, as it contains a statement of all the facts and circumstances which are essential to constitute the offence created by section 99 of "The Bank Act," it is not bad on that account.

The paraphrase in a proper construction of the wording of the indictment should have immediately followed the statement that the defendants had unlawfully made a monthly report, which is contained in the second allegation, but the indictment is not bad because the paraphrase, which contains a necessary averment, is placed elsewhere.

The indictment really contains all the necessary allegations to constitute the offence with which the defendants are charged; it alleges:—first, the capacity of the defendants; secondly, the making and sending of a wilfully false and deceptive report or statement of the financial condition of the Bank; and thirdly, the intent to deceive and mislead; and it is clearly sufficient to notify the defendants that they are accused of having wilfully made a false and deceptive representation or statement of the affairs of the Bank and of its financial position, in a monthly report made and sent by

them to the Minister of Finance and the Receiver General. The indictment is, therefore, sufficient and legal, and the demurrers pleaded by the three defendants separately are consequently unfounded. The three demurrers are therefore disallowed.

At the argument, the Crown Prosecutors moved to be allowed to amend the indictment by adding before the paraphrase the words "which said monthly report contained," and it was then contended by the Counsel for the defendants that the amendment asked for was one which could not be allowed under the circumstances. As I am of opinion that the indictment, however faulty in construction, is sufficient in law as it stands, I will not pass upon the objection raised as to the right to amend, and I simply dismiss the motion.

*Demurrers overruled.*

*J. P. Cooke, Q.C., and M. Hutchison, Q.C., for the Crown.*

*Donald Macmaster, Q.C., J. N. Greenshields, Q.C., R. C. Smith, Q.C. and Chas. Archer, for the defendants.*

**Note:** *Indictment—Necessary averments in—Quashing indictment as insufficient.*

An indictment that does not set up in the statement of the charge all the essential ingredients, is defective and cannot be sustained. So where an indictment charging the publication of a defamatory libel, did not state that the same was likely to injure the reputation of the libelled person by exposing him to hatred, contempt or ridicule, or was designed to insult him, it was held bad by reason of the omission of an essential ingredient of the offence. Such an indictment cannot be amended and must be set aside and quashed as the defect is a matter of substance. *R. v. Cameron* (1898) 2 Can. Cr. Cas. 173 (Wurtele, J.)

It is not necessary to allege in an indictment facts which the law will necessarily infer from the proof of other facts which *are* alleged. So where an indictment for unlawfully writing and publishing a defamatory libel omitted to allege

**Note—Continued.**

that the libel was published maliciously, it was held that the indictment was nevertheless good inasmuch as, upon proof of the publication of the libel, the legal inference, until rebutted by the defendant, was that it was published maliciously; and the allegation that the publication was malicious was not, therefore, a necessary averment. *R. v. Munslow* (1895) 18 Cox C.C. 112 (Lord Russell, C.J., Pollock, B., Wills, Charles, and Lawrence, JJ.)

It is not necessary that an indictment which sufficiently describes that which is by statute an indictable offence should conclude with the words "against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her Crown and dignity." *R. v. Doyle* (1894) 1 Can. Cr. Cas. 335 (Supreme Court of Nova Scotia).

Where a person charged before a court of summary jurisdiction has a right to elect to be tried by a jury in respect of an offence punishable summarily and not originally indictable, and by statute the court is thereupon to deal with the case as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, it has been held that, upon an indictment being preferred accordingly, the fact that the indictment is preferred in consequence of the defendant's claim to be tried by a jury is not a necessary averment therein. *R. v. Chambers* (1896) 18 Cox C.C. 401, 75 Eng. L.T. 76, (Lord Russell, C.J., Pollock, B., Hawkins, Grantham and Lawrance, JJ.)

The absence or the insufficiency of particulars does not vitiate an indictment nor an information; but if it should be made to appear that there is a reasonable necessity for more specific information, the court or magistrate may, on the application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the judge or magistrate. *R. v. France* (1898) 1 Can. Cr. Cas. 321, 329 (Q.B. Montreal.)

*What defects in an indictment may be amended.*

See Note 2 Can. Cr. Cas. 338.

## [SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DAVIE, C.J., MCCREIGHT, WALKEM AND DRAKE, JJ.

## THE QUEEN v. McANN.

*Summary conviction—Punishment in excess of jurisdiction—  
Unauthorised penalty of hard labor—Certiorari—Return  
of an amended conviction—What amendments allowed and  
when to be made.*

1. A summary conviction which illegally imposes imprisonment *with hard labor* in default of payment of the fine, may be amended at any time before it is acted upon, by the return of an amended conviction omitting the words "with hard labor" but in other respects conforming to the adjudication.
2. Such an amended conviction may be returned in answer to certiorari process although the first conviction has been transmitted by the magistrate, pursuant to a statutory requirement, to the court to which an appeal might be taken therefrom.
3. Where the only record of conviction produced before the institution of certiorari proceedings to quash the same is bad, and a valid amended conviction is produced in such proceedings, the costs of opposing the motion to quash should not be awarded against the applicant.

DECIDED : April 23, 1896.

Rule nisi for a writ of certiorari calling upon A. M. Whiteley, the prosecutor, and Arthur William Wright, the convicting justice, to shew cause why a writ of certiorari should not issue to remove into the Supreme Court a conviction of the applicant for having, at the City of Kaslo, discharged a firearm contrary to a by-law of the said city, the adjudication of sentence contained in the conviction being : "And I adjudge the said C. W. McAnn for his said offence to forfeit and pay the sum of \$20 and costs, and if the said sums are not paid forthwith I order that the same be levied by distress and sale of the goods and chattels of the said C. W. McAnn, and, in default of sufficient distress, I adjudge the said C. W. McAnn to be imprisoned in the common gaol of the said district, there to be kept at hard labor for the term of ten days unless the said several sums are sooner paid ; "

and why, upon the return of the rule the said conviction should not be quashed without the said writ of certiorari actually issuing, upon the ground that the said magistrate had no power under the said by-law or otherwise to impose imprisonment with hard labor for the said offence.

The defendant had appealed to the County Court, and the appeal came on to be heard and was adjourned, but was abandoned before it finally came on for hearing, and the present proceedings instituted.

The rule nisi was argued before Davie, C.J., on the 13th January, 1896.

*Robert Cassidy*, for the applicant.

*A. E. McPhillips*, contra.

VICTORIA, B.C., January 27, 1896.

DAVIE, C.J.—

The only question necessary to be decided in this case is whether a magistrate, who, in fining a person for an offence against a civic by-law, has directed imprisonment at hard labor in default of the penalty, can properly, in answer to a rule to quash the proceedings, send in a conviction omitting the hard labor.

Charles Whitfield McAnn was convicted before A. W. Wright, Esquire, Police Magistrate for Kaslo (setting forth the conviction), of having discharged a firearm contrary to a by-law of the said city, and as appears by the minute made at the time by the magistrate, fined \$20 and costs, to be levied by distress, and in default of distress to be imprisoned at hard labor.

Having obtained a rule nisi for certiorari to quash the conviction on the ground of want of jurisdiction to award hard labor in default of the penalty, it was shewn that he had also given notice of appeal to the County Court, which he had abandoned. The abandoned appeal would seem to present no obstacle to a certiorari based upon an excess of jurisdiction, *Reg. v. Starkey*, 7 Man. R. 43.

It was admitted upon the argument that the adjudication at hard labor could not be supported, but in answer to the rule the magistrate has returned a conviction which omits all mention of hard labor, and is otherwise upon its face properly drawn up. It is argued that the magistrate cannot do this; that although magistrates are not bound by the conviction first drawn up, whether it be merely a note of the conviction or drawn up in a formal manner (in this case it was only the note), but are at liberty, when called upon by certiorari, to draw up and return a formal conviction, correcting any errors which may have existed in that first drawn up, yet such amendments can be but of formal defects (*Houghton's case*, 1 B.C.R. Pt. I., 92), and in any event must be exercised according to the truth and facts of the case, and would not justify a magistrate, after his conviction had been attacked for an excess of authority, to return a conviction omitting all mention of the very excess upon which the conviction was attacked: *Chaney v. Payne*, 1 Q.B. 712; *Reg v. Bennett*, 3 Ont. R. 45.

On the other hand, in *Regina v. Hartley*, 20 Ont. R. 481, where the magistrate had ordered a penalty to be levied by distress when he had no jurisdiction to do so, a conviction returned to a rule for a certiorari omitting the distress was held to be unobjectionable. In *Rex v. Elwell*, 2 Lord Raym. 1514, the defendants were committed to Maidstone gaol "until they should pay a fine to the King." No fine having been set, or means provided by which the imprisonment would terminate, the conviction was quashed, and the court remarked that the justices "if a certiorari came to them might proceed to set a fine and complete their judgment, and it would be no contempt."

If this be so after the justice had drawn up a formal conviction, *a fortiori* would it be so when no formal conviction at all had been signed, up to which time (*Jones v. Williams*, 36 L.T.N.S. 559) the justices have a locus penitentiæ and may change their minds. Possibly they could not give any effect to a change of intention, as regards the adjudication of guilt or the penalty, without hearing the defendant, as pointed out

in *Reg. v. Brady*, 12 Ont. R. 363, and *Reg. v. Hartley*, 20 Ont. R. 485; but it seems to be otherwise as regards the consequences which follow the infliction of the penalty, *Reg. v. Hartley*, 20 Ont. R. at page 486. If the penalty appears to be properly ascertained by the conviction, the court will not enquire when it was fixed, for, if determined at any time before the conviction is formally drawn up and returned, that is sufficient: *Reg. v. Smith*, 46 U.C.Q.B. 445, quoting Paley on Summary Convictions, 5th ed., pages 271 and 424. It is not denied that the magistrate may by a fresh conviction remedy mere formal defects, and the unauthorized imprisonment with hard labor as a method of raising the penalty, can hardly be looked upon as more than a formal defect.

An excess of jurisdiction quite as grave was treated as a formal matter only by Coleridge, Wightman and Erle, JJ., in *Barton v. Bricknell*, 13 Q.B. 393. There the defendant in default of sufficient distress for costs amounting to 11s. was to sit publicly in the stocks for two hours, a method of raising the 11s. which the law in no way permitted.

The defendant after the conviction had been upset upon certiorari, brought an action for trespass against the magistrates, who set up 11 and 12 Vic. cap. 44, sec. 1, which provides that in the absence of express malice no action shall lie for anything done by a magistrate in the execution of his duty as a justice, with respect to any matter within his jurisdiction.

Coleridge, J., remarked: "The facts are these: There is an information laid before the justice; he convicts; he awards a penalty and costs, and orders them to be levied by distress. All this was right, and the justice, so far, pursued his jurisdiction. But he added an alternative, that the plaintiff should be put in the stocks in case the penalty and costs were not paid, or raised by distress; that was beyond his jurisdiction. But the plaintiff was not in fact put in the stocks. His goods were seized under a distress, and afterwards the conviction was quashed. Now it cannot be doubted that the justice had jurisdiction in everything except the alternative order, and the action is brought, not for putting the plaintiff in the stocks under it, but for doing that which



the defendant might have justified if he had drawn up his conviction in proper form."

And Wightman, J., remarks that the justice had a general jurisdiction in everything he did "down to the very moment of drawing up the conviction; but in drawing up the conviction he adds an illegal alternative, that if the costs are not levied the offender shall be put in the stocks. The matter in which he exceeded his jurisdiction was ordering the plaintiff to be put in the stocks; had he acted on that and caused the plaintiff to be put in the stocks, trespass might have lain; as it is, I think the action is not brought for a matter in which he exceeded his jurisdiction, and the case is within section 1."

And Erle, J., adds: "If anything had been done in respect of the wrongful order, it would have been an act beyond his jurisdiction, but there was nothing of the sort. It was a mere error as to the manner in which the conviction should be framed which caused the justice to draw it up in wrong form, and on account of the formal defect the conviction was quashed."

I cannot distinguish the present case from the principle of *Barton v. Bricknell*, 13 Q.B. 393. Had the magistrate, when the proceedings were brought up on certiorari, done as the magistrate had done here—that is to say, had he returned an amended conviction as he was at full liberty to do (*Reg. v. Hartley*, 20 Ont. R. 482, the reasons for judgment of Rose, J. in which case I think are unassailable), omitting the sitting in the stocks, which he had no jurisdiction to order, there can I think be no doubt that the conviction would have been affirmed; but the conviction in that case, as returned, shewing an admitted excess of jurisdiction in part, it vitiated the conviction as a whole (*Rex v. Catherall*, 2 Str. 900), and there was no alternative but to quash it. In *Reg. v. Walsh*, 2 Ont. R. 221, the same mistake of ordering imprisonment at hard labor in default of the penalty happened, and the court (Cameron, J.) whilst quashing the conviction on account of its not following the actual adjudication of the magistrate as to the quantum of costs, assumed that the second conviction

in that case properly omitted the wrongful adjudication as to costs.

If the defendant had gone on with his appeal to the County Court, that court would have amended the conviction by striking out the hard labor. The right to substitute a fresh commitment when an admittedly bad one was attacked upon certiorari proceedings, was upheld by Drake, J., in this court, *Re Plunkett*, 3 B.C.R. 484. In discharging the rule in that case it was without costs, as the proceedings were justified when launched. The same reason applies here, and I think the rule should be discharged without costs.

There being some doubt as to whether an appeal to the Full Court lies in British Columbia from an order refusing a writ of certiorari (see *Reg. v. Starkey*, 7 Man. 268 ; *Reg. v. Rice*, 20 N.S.R. 294, 437, 8 Can. L.J. 448), and in view of the fact that he had not given full consideration to the question of the effect of the return of the conviction to the County Court upon the right of the convicting justice afterwards to amend, the Chief Justice stated a case for the opinion of the Supreme Court sitting in banc, and the application was re-heard *de novo* before McCreight, Walkem and Drake, JJ., on 27th and 28th March, 1896.

*Robert Cassidy*, for the application : The adjudication and sentence to hard labor is a matter of substance and not of form. It is a material part of the judgment and appears in the minute of conviction. To cut it out of the conviction was not at any stage after the hearing (*Reg. v. Hellingley*, 1 El. & El. 749), an amendment open to the justice to make, and could not be made under color of curing an error in drawing up the conviction, which must in material respects follow the judgment ; and an amendment cannot be made so as to create a variance between the minute and conviction, *Reg. v. Elliott*, 12 Ont. R. at p. 531. The only course open would have been to retract that part of the adjudication in the presence of the accused before the justices' court rose. The right of the County Court to amend on appeal, under the Summary Convictions Act, 1889, sec. 76, is wider than

the common law right of amendment by the magistrate, yet the County Court could not so amend; *McLennan v. McKinnon*, 1 Ont. R. 219. Upon the return of the conviction to the County Court it passed beyond the control of the magistrate for all purposes and he became *functus officio*. The writ of certiorari, if it were necessary to issue it, which it is not, would have to be directed to the judge of the County Court as the present legal custodian of the conviction, *Regina v. Starkey*, 6 Man. R. 588, and not to the convicting magistrate, and the magistrate had no more right than any other person to meddle with or alter the record in the County Court. If a certiorari comes to him in respect of any record in his custody and control, his right to amend it will be arguable. It was questioned in *Chaney v. Payne*, 1 Q.B. 712, whether a magistrate could amend after a return to the sessions, and it was decided in *Ex parte Austin*, 44 L.T.N.S. 102, that he could not; although the amendment in both these cases were formal to cure errors in drawing up the convictions and make them conform to the adjudications. *Reg. v. McKensie*, 23 N.S.R. 6, and *Reg. v. Learmont*, 23 N.S.R. 24, follow *Ex parte Austin*, under circumstances similar to the present. *Reg. v. Hartley*, 20 Ont. R. 481, is distinguishable; there the conviction had not been returned to the County Court. The discussion was in reality academic on the question of right to amend, and the judgment on that point *obiter dictum*, as the right to the certiorari was there governed by section 105 of the Liquor License Act providing that no conviction under that Act should be held invalid for any defect either in form or substance, and therefore no amendment was required, but the conviction was good as it stood.

*A. E. McPhillips*, contra: We rely on *Reg. v. Hartley*, 20 Ont. R. 481. The conviction here has not been executed, and the magistrate has the right to amend even after return to the sessions; Clarke's Magistrate's Manual, 3rd ed. pp. 184 to 194; *Wilson v. Graybiel*, 5 U.C.Q.B. 227; and at any time up to the return of the certiorari, *Reg. v. McKensie*, 6 Ont. R. 165; *Charter v. Greame*, 13 Q.B. 216; *Re Houghton*,

1 B.C.R. Pt. 1, 89, Begbie, C.J., at p. 92. A conviction may be good in part, and only the part that is bad quashed, if divisible; *Reg. v. Over*, 14 Q.B. 425; *Rex. v. Fox*, 6 T.R. 148n.; *Reg. v. Green*, 20 L.J.M.C. 168; *Reg. v. Robinson*, 17 Q.B. 466; Paley on Convictions, 7th Ed. pp. 171 and 379.

VICTORIA, B.C., April 23, 1896.

McCREIGHT, J.—

As the learned Chief Justice observes in his proposed judgment, the only question necessary to be decided in this case, is whether a magistrate who, in fining a person for an offence against a civic by-law has directed imprisonment with “hard labor” in default of payment of the penalty and of no sufficient distress, can properly, in answer to a rule to quash the proceedings, send in a conviction omitting the provision as to the “hard labor.”

He further states the facts in the judgment which he had prepared before referring the case to the Full Court. They are very brief and not in dispute as I understand the case, and I refer to his statement of them to avoid repetition.

It seems to me that the case of *Regina v. Hartley*, 20 Ont. R. 481, is, if correct, quite in point, as fully warranting the return of an amended conviction leaving out that part of the sentence which inflicts “hard labor” in default of sufficient distress. There, as here, I gather there was a minute containing something illegal, in that case a provision that a fine might be levied by distress, and Mr. Justice Rose, in his judgment at page 482, says: “The minute of conviction and first formal conviction drawn up thereon therefore clearly contains a provision in excess of the jurisdiction of the magistrates, and such conviction could not be upheld,” and he adds, “the sole question for consideration is whether the second conviction returned with the certiorari can be sustained without an amendment of the adjudication or minute of conviction,” and he and the other judges thought it could. The facts of that case seem precisely similar to those now before us, and the *ratio decidendi* in *Regina v. Hartley* appears

to be strictly applicable to the present case. The objection that the adjudication contained a provision which was not found in the conviction appears to have been urged there as well as here, but it seems a good distinction applicable to both, that that is a very different matter from the conviction containing a substantial provision not found in the adjudication.

The latter position is illustrated by *Regina v. Brady*, 12 Ont. R. at p. 563 (referred to in *Regina v. Hartley*), where Wilson, C.J., says: "I have no doubt the magistrate could himself have amended the adjudication, but that should have been done in the presence of the defendant, which would have been in effect the real, because substituted, judgment; such a course is taken if from any cause at the assizes a change is made in the sentence by bringing up the prisoner and pronouncing the new judgment." I have referred to the case of *Regina v. Brady*, and the remarks upon it in *Regina v. Hartley*, because they illustrate the case of *Houghton*, reported 1 B.C. R. Pt. 1, p. 89, and referred to in the argument before us, and seem to be quite in conformity with it, or at least with the *ratio decidendi* of that case. At page 92 the judgment points out that the magistrate had convicted Houghton of "cutting," and drawn up and sealed a conviction accordingly, and then subsequently "sent in not an amended but a quite altered conviction, omitting all reference to the cutting but maintaining the charge of wilfully and maliciously inflicting grievous bodily harm, etc. The magistrate cannot be allowed to convict a man of one offence and on certiorari inform the court that he convicted him of another."

This, it will be observed, is quite in conformity with *Regina v. Brady*, and by no means inconsistent with *Regina v. Hartley*, see the judgment at page 485. The judgment in *Regina v. Hartley*, seems to have received a great deal of consideration (see pp. 485-6 of the judgment), and a period of seven months appears to have elapsed between the argument and the decision of the court; and I think I ought to act

upon it, as I find no English decision to the contrary, though expressions may be found which look the other way.

The learned Chief Justice says, in his judgment before referring the case to the Full Court, that in answer to the rule the magistrate returned a conviction which omits all mention of hard labor, and is otherwise upon its face properly drawn up, and so it appears from the appeal book. Now, in *Paley on Convictions*, 7th Ed. p. 234, it is said that even after the magistrate has delivered to the defendant a copy of the conviction, etc., he is not thereby precluded from drawing up and returning a conviction in a formal shape, which is to be taken as the only authentic record of the proceedings; for the conviction returned to the sessions or the Queen's Bench Division is the only one of which those courts respectively can take notice, and it is further said, at page 235, that as the court gives credit to the magistrates for the truth of the facts recorded in the conviction, it will hold them punishable for making a false statement, referring to *Rex v. Allen*, 15 East. 346, and *Reg. v. Simpson*, 10 Mod. 382; and at page 378 it is stated that the only remedy for a false return is by action on the case at the suit of the party aggrieved, or by criminal information, and *Hawkins*, P.C. cap. 27, sec. 74, is referred to as shewing that the Queen's Bench Division will not usually stop the filing of the return upon affidavits of its falsity. This makes an additional difficulty in making the rule absolute to quash the conviction.

I may add, though the question was not, in my view, necessary for the decision, that as the Summary Convictions Act, 1889 (B.C.) sec. 81, requires the convicting justice to transmit the conviction to the court to which the appeal is given before the time when appeal from such conviction may be heard, there to be kept by the proper officer among the records of the court, etc. (and as this must be presumed to have been done and I understand was done), that perhaps the writ of certiorari should properly be addressed to the persons having charge of such conviction, so as to be able to get a good and true return of the same. It is stated in *Short and*

Mellor's Crown Practice, pp. 125-6, that where the order of sessions is made upon an appeal against a conviction, notice of the intended application should be given to the convicting justices as well as to the justices present at the sessions, and I gather from the forms Nos. 12, 13, 14, 15, 16 and 17, page 592, that the same principle should be attended to as regards the issue and service of the writ. I have formed no opinion as to how this is to be done, or whether it is essential under the Summary Convictions Act, *supra*, but I only remark that the Supreme Court should be satisfied that it really has the true conviction before it when it undertakes to discharge or make absolute the rule. The remarks of the judges in *McLennan v. McKinnon*, 1 Ont. R. 219, 237 and 238, may have a bearing on this point.

I think the rule should be discharged without costs. The proceedings I gather were justified when launched, see *Re Plunkett*, 3 B.C. R. 484; and see the conclusion of the proposed judgment of the Chief Justice; and *Reg. v. Highan*, 26 L.J.M.C. 116; and 7 El. and Bl. 557.

WALKEM, J., concurred with McCREIGHT, J.

DRAKE, J.—

The magistrate in this case having convicted the defendant of an infraction of a by-law adjudged a penalty which was in excess of the penalty allowed by law. The conviction was drawn up and transmitted to the County Court in accordance with section 81 of chap. 26, 1889, of the Provincial statutes. On 17th December, 1895, a rule nisi to quash the conviction was obtained. In pursuance of the rule the magistrate returned an amended conviction omitting the hard labor which had been imposed in the first instance.

The point was raised that after the conviction had been returned to the County Court and there filed, that no amendment could be made. On this point *Ex parte Austin*, 44 L.T.N.S. 102, was cited, and Lord Coleridge says that no authority exists which supports the doctrine that once a bad conviction has been filed in the records of the Quarter Sessions

the magistrates, in answer to a rule to set it aside, may return a good one.

I do not think that Lord Coleridge means that after a conviction has once been returned to the Quarter Sessions it cannot be altered in any respect, as the contrary has held in many cases, see *Selwood v. Mount*, 9 C. & P. 75, and *Charter v. Greame*, 13 Q.B. 216; but a conviction imperfect from some error or omission in drawing it up, although returned to the County Court, can be cured by returning a good conviction in answer to a writ of certiorari.

The Statute 12 and 13 Vic. (Imp.) chap. 45, sec. 7, was passed in order to remedy the frequent failure of justice owing to convictions being set aside on objections to the form of the order or judgment irrespective of the truth and merits of the matters in question, and it enacts that if upon return of a writ of certiorari any objection shall be made on account of any omission or mistake, the court, on proof, can correct the same, and until the conviction is formally settled the magistrates can return a good conviction without the errors and mistakes complained of; *Chaney v. Payne*, 1 Q.B. 712.

The question then arises whether the adjudication which inflicted hard labor can, when the magistrates return a conviction omitting the hard labor, be treated as bad. The case of *Reg. v. Hartley*, 20 Ont. R. 481, seems very much in point, and the case of *Reg. v. Brady*, 12 Ont. R. at page 363, in which the court held that the adjudication was varied by a change in the infliction of a fine or imprisonment, and that such a step could only be taken in the presence of the defendant, being in fact a new judgment, was overruled.

The court can only look at the conviction returned, and that conviction is valid on its face. The original adjudication imposing hard labor was not acted on; if it had been, I think the defect could not be cured by returning a valid conviction.

I abstain from laying down any general rule as to what errors and mistakes in a conviction where the magistrate had



jurisdiction over the subject-matter can or cannot be cured by returning a proper conviction.

I think the rule should be refused without costs, as the original conviction was undoubtedly bad.

*Rule nisi discharged without costs.*

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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE THE HONORABLE MR. JUSTICE MEREDITH.

**Re E. J. PARKE.**

*Police Magistrate—Mandamus against—Refusal to proceed with information—Review of Magistrate's decision refusing summons—Cr. Code 138, 559.*

1. Where a police magistrate receives an information, and, after hearing and considering the allegations of the informant, decides that the statute invoked in support of the prosecution does not apply, and that what is charged does not constitute an offence, and therefore refuses to issue either a summons or warrant against the accused, a mandamus does not lie to compel him to do so.

ARGUED : January 26, 1899.

DECIDED : January 29, 1899.

Application for an order by way of mandamus to E. J. Parke, police magistrate of the city of London, commanding him to issue a summons to the returning officer in the last municipal elections for the city of London, to appear before him, the police magistrate, to answer a charge preferred against him, the returning officer, by the applicant, in not adjourning the proceedings for the nomination of mayor, etc., of the said city after the lapse of one hour from the time fixed for holding the meeting for the said nominations.

The application to the police magistrate was made on the information and complaint of W. H. Bartram, barrister, taken on oath before the said magistrate on the 31st December, 1898. The information was that "Charles A. Kingston, returning officer for the municipality of the city of

London, at the meeting of electors for the nomination of candidates for the office of mayor," etc., "on the 26th December, 1898, did without lawful excuse disobey the Act of the Legislature of the Province of Ontario (sec. 128 R.S.O. 1897, ch. 223) in that he wilfully and without lawful excuse did not adjourn the proceedings after the lapse of one hour from the time fixed for holding the meeting, and received nominations after the lapse of the said hour, and for which offence no penalty or other mode of punishment is expressly provided, contrary to section 138 of the Criminal Code, 1892."

The motion for the order for the mandamus was supported by an affidavit of the applicant setting out the information, and that the police magistrate had taken time to consider the matter and had been applied to for his decision, which he gave on the 29th January, 1899, refusing to issue the summons, as he did not think the Code applied to such a breach of the statute law; but stated that he would promptly do so if his opinion was not sustained on an application for a mandamus.

LONDON, January 26, 1899.

*W. H. Bartram*, the applicant in person, supported the motion: The information disclosed an offence. There was a disobedience of sec. 128 of the Municipal Act, R.S.O. ch. 223, and there being no penalty or punishment provided by that Act, section 138 of the Criminal Code, 55-56 Vict., ch. 29, (Can.) applies, and makes it an offence under the Code, the procedure therefor being given by sections 588-9 of the Code. Under sec. 7 of the Police Magistrates' Act, R.S.O. ch. 97, the police magistrate was the only person who could act in the premises. The duty imposed on the magistrate was of a judicial character, and there being a refusal to perform it a mandamus lies: *Queen v. Connolly* (1891), 22 Ont. R. 220; *Regina v. Carden* (1879), 5 Q. B. D. 1; *Re Holland* (1875), 37 U.C.Q.B. 214.

*T. H. Purdom*, for the police magistrate, contra: Section 219 and the following sections of the Municipal Act provide

the mode for testing the validity of an election, and under these sections the validity of this election can be raised and tried ; and under section 204 no election is to be avoided for want of compliance with the provisions of the Act when the mistake or irregularity does not affect the result. Here the election itself has not been questioned. The provisions of the Criminal Code, therefore, do not apply.

*Bartram*, in reply : The validity of the election is not the question in this proceeding, but whether there has been a disobedience of the provisions of a statute : section 204 does not apply at all. In any event it could only apply when the provisions of the Act have been substantially complied with.

TORONTO, January 29, 1899.

MEREDITH, J.—

Assuming that section 138 of the Code is applicable to a case of this kind, and assuming that there are no other difficulties in the way, this motion must be refused because no wilful disobedience of any statute has been shewn, and that it ought to be shewn, not only after but also before, any criminal prosecution for such an offence is permitted.

The complaint is made against the city clerk of London, a gentleman learned in the law, and against whose integrity nothing is alleged. The charge is that he did not close the meeting for the nomination of candidates for municipal officers in London at the lapse of one hour from the time fixed by law for opening it ; though a claim was then made that the statute required him to do so. But there is nothing in the statute expressly requiring that to be done.

Section 128 (2) provides that the clerk shall, after the lapse of one hour from the time fixed for holding the meeting, declare the candidate elected, "if only one candidate for any particular office is proposed."

In this case more than one candidate had been proposed within the hour, and so that sub-section was not applicable. It is the third sub-section that is applicable, and that makes

no provision as to the time within which the proceedings under it are to be taken. It merely provides for an adjournment of the proceedings for the purpose of holding a poll in case more candidates are proposed for any particular office than are required to be elected.

It may, or it may not, be held that inferentially the time limited by sub-section (2) is to be applied to sub-section (3), so that the adjournment ought to take place after—that is, in a reasonable time after—the lapse of the hour ; but it is quite another thing to say that a man may be criminally prosecuted because he failed to put that interpretation upon the sub-section in question, and to have acted upon that interpretation of it.

If the case be one to which the sections of the Code in question could be applicable, then it must be a case to which the maxim *actus non facit reum, nisi mens sit rea* applies, and there should be evidence of guilty intention before criminal proceedings : *Rex v. Borron* (1820), 3 B. & Ald. 432.

There are no facts before me upon which any improper motive could be attributed to the city clerk ; there is nothing to shew that he did not act according to the best of his judgment with the purest and best intentions. Even if it could be assumed that he erred in judgment, as to which I express no opinion one way or the other, as the question may be raised in civil proceedings, it is not to be assumed that he acted knowingly and fraudulently : *Regina v. Badger* (1856), 6 E. & B. 137.

It was the duty of the police magistrate, upon receiving the information, to hear and consider the allegations of the informant, and if of the opinion that cause for issuing a warrant or summons was not made out, to refuse it. And, having so acted, this Court has no jurisdiction over him. It is his judgment, not mine nor that of any other Judge or Court, which is to be exercised under section 559 of the Criminal Code : see *Ex p. Lewis* (1888), 21 Q. B. D. 191 ; *Regina v. Paynter* (1857), 7 E. & B. 327 ; and *Regina v.*

*Dayman* (1857), 7 E. & B., 672. This application must therefore be refused.

*Motion dismissed with costs.*

**Note :**

An appeal was taken from the above judgment to a Divisional Court of the High Court of Justice, [Armour, C.J. Q.B., Falconbridge and Street, JJ.] and was dismissed upon the ground that upon the proper construction of the clauses in question of the Municipal Act of Ontario, the returning officer against whom the information had been laid had proceeded properly in not adjourning the election proceedings, and that therefore no offence had been committed. [Q.B.D., February 13, 1899.]

## [COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE WÜRTELE, J.

## Ex parte SEITZ (No. 2).

*Extradition—Powers of Extradition Commissioner—Warrant against fugitive who is neither within nor suspected to be within his territorial jurisdiction—Arrest in another Province—Discharge for want of jurisdiction—New complaint while fugitive within jurisdiction—Validity of fresh proceedings—Re-arrest—Habeas Corpus—Res judicata—Proof of foreign law—Cr. Code 305, 311.*

1. When a prisoner is discharged upon habeas corpus merely by reason of a defect in the commitment or for lack of jurisdiction in the committing magistrate, such discharge is not a bar to the prisoner's re-arrest and trial before a court of competent jurisdiction in respect of the same charge.
2. To constitute such a bar, the case must be such that the return to a second writ of habeas corpus following the re-arrest would raise the same question as the first with reference to the validity of the grounds of detention.
3. Where a person known to be in the Province of Ontario is arrested there under an extradition warrant issued by an Extradition Commissioner of the Province of Quebec, and is taken to the latter Province under such warrant and there discharged upon habeas corpus for want of jurisdiction in the Commissioner to issue a warrant unless the fugitive is in or suspected to be in the Province for which he has jurisdiction, the accused may, notwithstanding, be legally re-arrested in Quebec province under a new complaint in respect of the same extradition offence.
4. *Seemle*, that the Commissioner may decline to exercise his jurisdiction upon the new complaint if the prisoner has been inveigled into his jurisdiction by a trick or device of the adverse party.
5. Before ordering the extradition from Canada of a fugitive, an Extradition Commissioner must be satisfied that the offence charged is a crime against the law of the country demanding the extradition, as well as that it would, if committed in Canada, be an offence against Canadian law, and that it is within the treaty with the foreign country.

MONTREAL, September 13, 1899.

WÜRTELE, J.—

The prisoner, on the 16th May last, was arrested in the

City of Toronto on a warrant issued at Montreal under the provisions of "The Extradition Act" upon a complaint laid against him by the Imperial German Consul for Canada, before Mr. Lafontaine, an Extradition Commissioner for the Province of Quebec, on a charge of having embezzled at Mannheim, in Germany, a sum of about 9000 marks, equal to about \$2.200, from the firm of Jean Seitz & Co., and he was brought to Montreal in order that proceedings should be taken to have him extradited to Germany. After the usual inquiry, the Extradition Commissioner committed the fugitive for surrender to the Government of the German Empire, but he complained that the proceedings taken against him were illegal, and he applied for and obtained a writ of habeas corpus, which was returned before me on the 19th July last. After hearing the parties, the writ was maintained and the prisoner was discharged, on the ground that the jurisdiction of Mr. Lafontaine as an Extradition Commissioner was limited to the Province of Quebec, and that he had no jurisdiction and authority to issue a warrant for the arrest of the fugitive upon a complaint which did not show that he was within the territorial limits of the jurisdiction of the Extradition Commissioner, but which expressly stated that he was at Toronto, within the Province of Ontario, and that the warrant and all the subsequent proceedings founded upon the complaint were therefore illegal and void. (*Ex parte Seitz* No. 1, ante page 54.)

Immediately after the prisoner's discharge, a new complaint was laid before Mr. Lafontaine, the Extradition Commissioner, setting up the same offence which he had before been charged with having committed in Germany, but alleging, however, that the fugitive was then in the City of Montreal, within the limits of the Province of Quebec and of the jurisdiction of the Extradition Commissioner. A new warrant was issued on this complaint, and the prisoner was forthwith arrested and brought before the Extradition Commissioner.

After having heard the witnesses produced on behalf of the State demanding the extradition of the fugitive, and after

the production and examination of copies of the warrant which had been issued and of the depositions which had been taken in Germany, and of the other documents which had been produced there, the Extradition Commissioner, on the 18th August last, committed the fugitive for extradition. The prisoner then applied for and obtained a new writ of habeas corpus, and he was brought before me in order that the legality of the proceedings taken against him might be looked into, and I have heard the arguments of the parties on the contentions raised by the fugitive's counsel.

The following propositions have been submitted to me on behalf of the fugitive : *Firstly*, That having been discharged on habeas corpus, the prisoner could not be again legally arrested and committed for the same offence ; *Secondly*, That having been brought into the Province of Quebec on process which had been declared illegal, he could not be legally arrested here for the same cause after having been discharged from his illegal detention ; *Thirdly*, That the evidence adduced before the Extradition Commissioner was illegal ; *Fourthly*, That the evidence adduced would not have justified his committal for trial according to the law of Canada if the offence with which he is charged had been committed in this country ; and *Fifthly*, That the Extradition Commissioner did not take cognizance of the law of Canada, but relied wholly upon the German law.

The prisoner's counsel founds his contention that his arrest and the subsequent proceedings were illegal in consequence of having been discharged on a previous writ of habeas corpus, on the 11th section of the Act respecting the writ of Habeas Corpus (C.S.L.C. cap. 96), which is the same as the 6th section of the English Habeas Corpus Act (31 Car. 2, cap. 2). This section provides that "No person set at large upon habeas corpus shall, at any time thereafter, be again imprisoned or committed for the same offence by any authority whosoever, other than the legal process and order of the Court wherein he is bound by recognizance to appear, or other Court having jurisdiction of the cause." He



therefore contends that having been discharged from the commitment founded on the charge of having fraudulently converted to his own use moneys belonging to the firm of Jean Seitz & Co., of which he was a partner, he cannot be again arrested and committed and imprisoned for the same offence. The section, however, on which the prisoner's counsel relies does not bear the construction which he puts upon it. In the case of the *Attorney General for the Colony of Hong-Kong vs. Kwok-A-Sing*, L.R. 5 Privy Council Appeals 201, their Lordships of the Privy Council, on the 19th June, 1873, decided that such a construction could not be put upon the sixth section of the English statute, which is similar in its terms to the 11th section of our statute. As the ruling in this case is very concise, I will repeat the words of Lord Justice Mellish, who rendered the judgment of their Lordships; he said:—

“The principal object of this section seems to have been  
“to prevent persons who had been brought up on a writ of  
“habeas corpus, and discharged on giving bail and entering  
“into their own recognizance, from being again arrested for  
“the same offence, and obliged to sue out a second writ of  
“habeas corpus. This appears from the provision by which  
“the person discharged may be again arrested by the order  
“of the Court wherein he shall be bound by recognizance to  
“appear, or other Court having jurisdiction of the cause.  
“The words, *other Court having jurisdiction of the cause*,  
“were probably added to meet the case of an indictment  
“having been moved by certiorari from one Court to  
“another.”

But although the section cited by the prisoner's counsel does not lay down the principle that a prisoner after having been discharged on habeas corpus cannot be lawfully arrested and imprisoned again for the same offence, nevertheless, when the discharge is granted after an adjudication on habeas corpus upon the merits of the case—that is, upon the question of the legality of the conviction or judgment ordering the imprisonment, and not solely upon an illegality in the commitment, the doctrine of *res judicata* applies, and

consequently under such circumstances the decision on a writ of habeas corpus is binding and is a bar to any new proceedings on the same charge. In such a case, to cite from Wood on Mandamus and Habeas Corpus, at page 177 :—"The adjudication is conclusive upon the same parties in all future controversies relating to the same subject matter and upon the same state of things."

The question whether a proceeding subsequent to an adjudication on habeas corpus is barred by such adjudication, is to be determined by the identity or non-identity of the question before the Court or magistrate with the question which was adjudicated upon on habeas corpus. This question was also referred to by Lord Justice Mellish in the case I have just cited, and I will quote his words :—

" Their Lordships do not say, however, that the section may not also apply to cases where a prisoner is discharged unconditionally upon the ground that the warrant, on which he is detained, shows no valid cause for his detention. They think, however, it can only apply when the second arrest is substantially for the same cause as the first, so that the return to the second writ of habeas corpus raises for the opinion of the Court *the same question* with reference to the validity of grounds of detention as the first."

The rule, therefore, is that when a prisoner has been discharged upon the merits of the charge laid against him, when the conviction or order of detention founded on the charge is set aside as unfounded in law, the prisoner thus discharged cannot be lawfully arrested and imprisoned again for the same offence upon the same state of facts, but that when the prisoner is discharged merely by reason of a defect in the commitment or in consequence of the want or excess of jurisdiction in the committing Court or in the committing magistrate, he can be again arrested and tried for the same cause before a competent Court or a competent magistrate. In the present case the prisoner was not discharged, because the charge laid against him was unfounded in law, but simply because the Extradition Commissioner's jurisdiction was

limited to the Province of Quebec, and that the warrant issued in the Province of Quebec, under which he was arrested in the Province of Ontario, and his arrest under such warrant, were illegal and void by reason of the Extradition Commissioner's want of jurisdiction and of his personal incapacity to act judicially in the matter. Consequently, neither under the provisions of section 11 of our Act respecting the writ of habeas corpus nor under the doctrine of *res judicata* can the fugitive now raise a plea of immunity from the consequence of his offence. As a general principle, the judgment or the order of a Court or judge having competent jurisdiction is conclusive whenever precisely the same matter is again brought into controversy. When a prisoner is discharged on habeas corpus, it is necessary, in order for such discharge to protect him from a subsequent prosecution for the same offence, that the same state of facts should exist with respect to both the adjudication under the writ of habeas corpus and the subsequent prosecution. In the present case the same state of facts did not exist. On the writ of habeas corpus, the question was not whether the prisoner was properly charged with the commission of an extradition crime and whether there was a presumption or a *prima facie* case of criminality against him, but it was whether the Extradition Commissioner had jurisdiction and authority to act judicially on the complaint which had been laid before him ; and the same question did not arise on the new proceedings. In the first instance a warrant was issued in the Province of Quebec for the arrest of the fugitive, who was stated to be in the Province of Ontario, while in the proceedings taken subsequently to the decision under the writ of habeas corpus, the writ has been issued, for the same offence it is true, but for the arrest of the fugitive in the Province of Quebec, within the territorial jurisdiction of the Extradition Commissioner. The same state of facts does not therefore exist in both the proceedings. I consequently overrule the first objection raised by the counsel for the prisoner.

The second objection raised on behalf of the prisoner is that he was illegally brought to Montreal in order that proceedings might subsequently be taken to have him extradited to Germany, and that consequently the second arrest and all proceedings taken on the second complaint were illegal. As a matter of fact, the issue of the first warrant and the arrest of the fugitive under it were due to a misapprehension with respect to the jurisdiction of the Extradition Commissioner, and were not due to any trick or device on the part of the prosecutor for the purpose of bringing the fugitive into the jurisdiction of the Extradition Commissioner. The new complaint was laid before the Extradition Commissioner and sworn to only after the discharge under the writ of habeas corpus of the fugitive, and it sets forth the circumstances of the extradition crime with which the fugitive is charged, and states that he was then within the Province of Quebec, and consequently within the territorial jurisdiction of the Extradition Commissioner. The Extradition Commissioner had jurisdiction under this complaint to issue a warrant of arrest and to hold an investigation on the charge which was laid before him. The objection is not that the Extradition Commissioner has not jurisdiction over the fugitive, but that he ought not to exercise his jurisdiction in favour of a prosecutor who has obtained the issue of a warrant of arrest by fraudulent and unlawful means. But for a magistrate to decline to exercise his jurisdiction, the trick or fraudulent device must be chargeable to the prosecutor, and it should appear that the prisoner has been inveigled into his jurisdiction by a trick or device of the adverse party. In the present case the prosecutor cannot be charged with any fraudulent device, artifice, or contrivance, while on the other hand the Extradition Commissioner had full jurisdiction over the person of the fugitive with respect to the subject matter of the complaint laid before him. Under the circumstances of the case, the fugitive was still liable to be arrested for extradition ; if he returned to the Province of Ontario he could be arrested

there under the warrant of an Ontario Extradition Commissioner, and on the other hand his discharge did not constitute the Province of Quebec to be a haven of refuge or asylum where he could remain with immunity. I must, therefore, and I do overrule this second objection.

The third contention raised on behalf of the prisoner is that the evidence adduced before the Extradition Commissioner was illegal. I have examined the depositions taken by the Extradition Commissioner, and also the warrant of arrest and the depositions which were taken, and the other documents which were produced before the Criminal Court in Germany. I find that the evidence given here was properly taken and that it is legal and competent evidence, and that the documents sent over by the Government of the German Empire are all properly authenticated. By the Canada Evidence Act, the copies of any proceedings before any Court of Record of any foreign country are receivable in evidence when purporting to be under the seal of such Court, without any proof of the authenticity of such seal being necessary; and under the Extradition Act depositions taken in a foreign State on oath, and copies of such depositions are deemed to be duly authenticated if such copies purport to be certified as true copies by a Judge or officer of the foreign State. In the present case the documents produced are authenticated by the seal of the Grand Ducal Superior Court of Baden, and also by the signature of the Judge of Instruction of such Court, and both the seal and signature are certified, although this was not necessary, by the substitute of the Chancellor of the German Empire, whose signature is identified under oath by Mr. Bopp, the Imperial German Consul for Canada. I find that the evidence contained in these documents is also legal and competent. I therefore declare the evidence adduced before the Extradition Commissioner to be legal and competent, and I overrule the objection made to it.

The fourth objection is that the evidence adduced would not have justified the committal of the fugitive upon the

charge brought against him, according to the law of Canada, if the crime charged against him had been committed in Canada. I have read all the depositions and documents in the case, which have been produced before me under a writ of certiorari, and I can only say that they contain full evidence of the identity and of the probable criminality of the fugitive, and that the evidence so produced would have been sufficient to put the fugitive on his trial if he had been accused of having fraudulently appropriated in Canada moneys belonging to a partnership of which he was one of the members. I consequently overrule the objection.

The last objection raised on behalf of the fugitive is that the Commissioner relied wholly upon the German law and did not take cognizance of the law of Canada. An extradition crime is one which, if committed in Canada, would be one of the crimes described in the first schedule of "The Extradition Act," R.S.C. (1886) c. 142, and also any crime which is mentioned in a treaty with a foreign country, whether comprised or not in the schedule; and every such offence must contain under the law of both countries the same elements of criminality. The "Extradition Act" contemplates such acts as constitute one of the offences specified either in the statute or in the treaty with the foreign country, according to the law of both countries, and not such acts as constitute an offence only by the legislation of the foreign State, and therefore the quality of the offence must be determined when the extradition of a fugitive criminal is demanded in the Dominion by the law of Canada. In order to obtain the extradition of a fugitive criminal, according to the dictum of Lord Russell of Killowen in *Re Arton*, 18 Cox C.C. 281, the crime imputed to the fugitive must be within the treaty, it must be a crime against the law of the country demanding the extradition, it must be a crime within the Extradition Act, that is, also against our law, and therefore against the law of both countries; and there must be such evidence before the Extradition Commissioner as would

warrant him in sending the case for trial if it were an ordinary case in this country.

There are acts of wrong which, by their nature and the usage of nations, constitute crimes in all civilized communities, and which are known by a general denomination, and these crimes contain the same elements of criminality in all places. In such cases it is sufficient that the Extradition Commissioner be satisfied that the facts laid before him contain the essential ingredients of the offence of which the fugitive criminal is accused. Then there are acts of wrong which constitute crimes of the same nature and quality in several countries under their respective statute law; and again, there are also acts of wrong which may constitute a crime by the statute law of one country and be no crime in another country, and such crime may bear in the country where it exists an appellation which is in use in both countries; in these cases it is necessary to take the evidence of a foreign lawyer to see what acts constitute the crime mentioned in the complaint under the law of the foreign country, so as to enable the Extradition Commissioner to ascertain whether the offence contains the same elements of criminality in both the foreign country and our country, so as to enable him to be satisfied that the crime imputed to the fugitive criminal is a crime against the law of the country demanding the extradition and is also a crime against the criminal law of our country, and that it is therefore in that respect an extradition crime.

The fugitive is accused of having fraudulently appropriated to his own use moneys belonging to a partnership of which he was one of the members. It is established by the evidence of Mr. Bopp, the Imperial German Consul, who studied law in Berlin, and became qualified to be appointed a Judge of any Court of Superior original Jurisdiction in the German Empire, and who is therefore a competent expert as to the law of that country, that the fraudulent appropriation committed by the fugitive of moneys belonging to a partnership of which he was a member, constitutes a crime under Article 246 of the Penal Code of the German Empire,

which enacts that whoever so unlawfully appropriates movable property not his own, which he has in his possession or keeping, is guilty of a crime which subjects him to an imprisonment, and that this crime is defined as embezzlement. Section 58 of the Larceny Act (R.S.C. 1886, cap. 164) enacted that any one who, being a member of any co-partnership owning any money, should steal or embezzle or unlawfully convert the same or any part of the same to his own use, should be liable to be dealt with and punished as if he had not been a member of such co-partnership, and this crime of stealing by a partner was known and defined indifferently either as larceny or as embezzlement. Both the German and the Canadian law were in force when the treaty between the Governments of Great Britain and of the German Empire was entered into. Article 305 of our Criminal Code defines the act of fraudulently converting to the use of any person anything capable of being stolen as "theft," and Article 311 states that "theft" may be committed by one of several partners of anything in which his co-partners have any interest; so that now this crime, which was formerly known as either "larceny" or "embezzlement," is called and defined in Canada as "theft," while it is still called and defined as "embezzlement" in Germany.

The crime of which the fugitive is accused contains the essential ingredients of the offence specified in Article 246 of the Penal Code of the German Empire and in Section 58 of the Larceny Act, and in Articles 305 and 311 of our Criminal Code, and the facts specified in the complaint constitute the same offence under both the German and the Canadian law, although, as I have already said, in the German law the crime is defined as "embezzlement," while in ours it was defined as either "larceny" or "embezzlement" before the enactment of the Criminal Code, and is defined as "theft" since its enactment.

Under the treaty with the Empire of Germany, embezzlement and larceny are declared to be crimes for which the extradition of a fugitive criminal can be obtained. By the evidence adduced there is no doubt but that the acts



described in the proceedings constitute a crime common to both countries, and that it also comes within the definition of the crimes for which extradition can be demanded under the treaty with Germany. The Extradition Commissioner had proof before him of the commission of certain acts, and he knew from his own knowledge that such acts constituted the crime of theft, which was formerly known as larceny or embezzlement under the law of Canada, and from his own knowledge he therefore took cognizance of the law of Canada, but as he had no personal knowledge of the criminal laws of Germany he had to have recourse to an expert in the foreign law in order to ascertain what that law was. The Extradition Commissioner did not therefore rely upon the German law without any regard to the law of Canada, and the course followed by him was perfectly legal. The objection must therefore fail, and is overruled.

On the whole, I find that all the proceedings taken in the present case before the Extradition Commissioner, and the committal of the fugitive for surrender to the Government of the German Empire, were regular and legal. The writ of habeas corpus is therefore quashed, and it is ordered that the prisoner be remanded for surrender, or until he may be otherwise discharged according to law.

*Prisoner remanded.*

*W. J. White, Q.C., for the Petitioner.*

*Edmond Guerin, Q.C., for the Crown.*

## [COURT OF APPEAL FOR ONTARIO.]

BEFORE HAGARTY C.J.O., BURTON, OSLER AND MACLENNAN,  
JUSTICES OF APPEAL.

**MCGUINNESS v. DAFOE.**

*Arrest—Warrant without sworn information—Peace officer—  
Belief that offence committed—Jurisdiction of magistrate  
although arrest illegal—Cr. Code 22, 23, 558, 559.*

1. If a justice of the peace is not himself personally arresting the offender on view or upon suspicion, or personally acting in effecting the arrest by calling some one to his assistance in making the same, he can legally direct the arrest only by a warrant issued upon a written complaint or information upon oath.
2. A justice of the peace who illegally issues a warrant without having received a sworn information in respect of the charge is liable in trespass for the arrest made thereunder, and he cannot justify the commanding of the constable to make the arrest by showing that he, the justice, had a reasonable suspicion that an offence had been committed. (Cr. Code, s. 22.)
3. Although an arrest has been illegally made under an invalid warrant, jurisdiction attaches to the magistrate when the person arrested is brought before him; and the subsequent detention and commitment may be justified under the order then made by the magistrate.

ARGUED : February 10 and May 14, 1896.

DECIDED : June 30, 1896.

Appeal by the defendant from the judgment of the Queen's Bench Division of the High Court of Justice, reported 27 Ont. R. 117.

The defendant was a justice of the peace, and the plaintiff, who was arrested on a charge of arson on a warrant issued by the defendant without a sworn information, brought the action to recover damages for trespass and malicious prosecution.

The Criminal Code of Canada contains the following provisions :—

“3 (s.) The expression “peace officer” includes a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, and justice of the peace, and also the warden, keeper or guard of a penitentiary and the gaoler or keeper of any

prison, and any police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace, or for the service or execution of civil process.

22. Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not.

23. Every one called upon to assist a peace officer in the arrest of a person suspected of having committed such offence as last aforesaid is justified in assisting if he knows that the person calling on him for assistance is a peace officer, and does not know that there is no reasonable grounds for the suspicion.

558. Any one who, upon reasonable or probable grounds, believes that any person has committed an indictable offence against this Act may make a complaint or lay an information *in writing and under oath* before any magistrate or justice of the peace having jurisdiction to issue a warrant or summons against such accused person in respect of such offence.

(2) Such complaint or information may be in the form C in schedule one hereto, or to the like effect.

559. Upon receiving any such complaint or information the justice shall hear and consider the allegations of the complainant, and if of opinion that a case for so doing is made out he shall issue a summons, or warrant, as the case may be, in manner hereinafter mentioned; and such justice shall not refuse to issue such summons or warrant only because the alleged offence is one for which an offender may be arrested without warrant."

TORONTO, February 10, 1896, and May 14, 1896.

*W. Nesbitt, W. R. Riddell, and H. E. Rose, for the appellant.*

*Clute, Q.C., and J. A. Macintosh, for the respondent.*

TORONTO, June 30, 1896.

BURTON, J.A.—

Whether the case of *Sinden v. Brown*, 17 Ont. App. 173, was or was not properly decided, it is binding upon me as well as every other member of the court so long as it remains unreversed by some higher tribunal ; but it does not, in my opinion, govern this case. Here the magistrate was aware of the necessity of a sworn information to justify the issue of a warrant, and he was aware that there was no sworn information in this case ; he could not, therefore, believe that he had any jurisdiction to order the arrest ; if there had been any question as to the facts the opinion of the jury must necessarily have been taken, but the facts are undisputed. In the confusion the magistrate unfortunately omitted to have the information sworn to, but he was aware of the necessity for it, and was also aware, as he admits, that it was not done ; he is not, therefore, entitled, in my opinion, to the protection of the statute, having acted wholly without jurisdiction, and being aware that he was so acting. Something was said about his invoking the aid of the information in the other case, but the warrant was not issued upon that information, and such belief would not, in my opinion, have assisted him, as the facts would not, if proved, have afforded any justification. The information in that case was against a different person, his name was not mentioned in it, and the warrant would still be without any sworn information to support it.

As I am of opinion that no notice was necessary, and my learned brothers hold that that given was sufficient, there must be a new trial as ordered by the Divisional Court, but I agree with my learned brothers that it should be confined to the trespass count.

OSLER, J. A.—

In this case the defendant by some oversight appears to have issued his warrant without the information, which had been laid before him charging the plaintiff with the

offence, having been actually sworn. By the provisions of the Code, sections 558, 559, 563, a justice has jurisdiction to issue a warrant only upon a complaint or information in writing being laid before him. Here there was no such complaint or information, and, the arrest having been made by the constable under the authority of the defendant's warrant directed to him, the defendant having acted without jurisdiction in issuing it is liable in trespass.

But, being sued in trespass for the arrest thus made, he says, granted that I had no jurisdiction to issue the warrant, yet I am justified, if you say it was my trespass, by the 22nd section of the Code, because I was a peace officer [sec. 3 (s)] who, on reasonable and probable grounds, believed that an offence for which the offender might be arrested without warrant had been committed, whether it had been committed or not, and who on reasonable grounds believed that the plaintiff had committed the offence, and the constable or other peace officer who actually made the arrest was acting for or in aid of me, or at my request in doing so. This contention was pressed upon us with much force by Mr. Riddell, who argued that *Ashley's Case*, 12 Rep. 90, cited and relied upon in the court below, was not law, referring to numerous cases in the year books and the observations of various writers upon the authority of the volume in which *Ashley's Case* is reported. I am of opinion, however, that the argument cannot prevail. Section 23 of the Code being read with section 22, it seems plain that what both point at is the personal or individual act of the peace officer. Section 22 justifies the officer—justice or constable—in personally arresting a suspected person under certain circumstances without warrant; that is to say, just as if he had a warrant in his possession authorizing him to do it; and section 23 justifies everyone who is called upon to assist the peace officer in making the arrest, if he knows that he is a peace officer, and does not know that there are no reasonable grounds for the suspicion which justifies the latter in acting. These sections are merely a codification of the common law.

"If a justice see a felony or other breach of the peace committed in his presence, he may in his own person apprehend the felon. And he may also by word command any person to apprehend him, and such a command is a good warrant without writing. But if the same be done in his absence then he must issue his warrant in writing":

5 Burn's Justice of the Peace, 30th ed., p. 1114.

"Justices of the peace have a double power as in relation to the arrest of felons; one, upon complaint of another person, . . . ; another, primitive and original in themselves."

"If a justice of peace see a felony or other breach of the peace committed in his presence, he may in his own person apprehend the felon. And so he may by word command any person to apprehend him. And such command is a good warrant without writing, but if the felony or other breach of the peace be done in his absence, then he must issue his warrant in writing under his seal to apprehend the malefactor. . . . And note, that if the justice of peace hath either from himself or by a credible information from others knowledge of a felony done and just cause of suspicion of any person, he may himself arrest and commit that person": 2 Hale's Pleas of the Crown, pp. 86, 87.

"And as long as he fills that character he appears to enjoy the same latitude as a constable of arresting a person on reasonable suspicion of having committed a felony, without being called upon to prove that a felony has been actually committed": 1 Burn's Justice of the Peace, 30th ed., p. 293.

*Ashley's Case*, 12 Rep. 90 at p. 92, referred to in the court below, seems to be the case of an arrest by a private person upon suspicion, and is thus commented upon in 2 Hale's Pleas of the Crown, p. 80: "It is true, that he that is not an officer cannot justify by the command of him who suspects, if he be also no officer: 12 Rep. 92; (If he is an officer and the felony is committed in his presence he may do so, *supra*.) But then the case is easily solved, for if a felony

be committed, and A. hath probable cause to suspect B. and accordingly suspects B. and acquaints C. with the whole matter, C. upon this, having probable cause to suspect B. though he cannot justify the imprisonment of B. as by the command of A. that first suspected him, he may justify by his own suspicion ; and the like of him that comes in aid of A. to arrest B."

"An officer of justice, may, in assistance of him that suspects, justify the imprisonment ; as a constable upon complaint made to him by him that suspects, may justify. And in like manner a justice of the peace, upon being applied to by him that suspects, and (is) acquainted with the whole circumstances of the case": 2 Hale's Pleas of the Crown, p. 79.

Coke in his Institute, p. 177, had laid it down that "A justice of the peace can not make a warrant to take a man for felony unless he be indicted thereof . . . For the justice himself cannot arrest one for felony, unless he himself suspect him, (as any other may) and by the same reason he cannot make a warrant to another."

This was strongly controverted by Hale, who shows the law to be that a justice, upon oath made by A. of a felony committed, and that A. suspects B. and shows his cause, may issue a warrant to bring B. before him for further examination : 2 Pleas of the Crown, p. 79.

Hawkins, Pleas of the Crown, vol. 2, p. 134, is less positive, saying that "it seems probable that the practice of justices of peace in relation to this matter also is now become a law, and that any justice of peace may justify the granting of a warrant for the arrest of any person upon strong grounds of suspicion for a felony, or other misdemeanour, before any indictment hath been found against him." In *Butt v. Conant*, 4 Moo. 195 ; 1 Bro. & B. 548 ; Gow 84, it was so determined upon a learned review of the authorities ; and then followed Jervis's Act and our own statute, and finally the Code, providing that the warrant must be issued upon complaint or information in writing upon oath.

If, therefore, the justice is not himself personally arresting the offender on view or upon suspicion, or calling in some one to assist him in doing so, he can only act by issuing a warrant to apprehend the offender in the manner authorized by law. It is the former case to which sections 22 and 23 are applicable, the actual personal interference of the justice and those whom he calls to his assistance in making the arrest. There is no authority for saying that as peace officer he has any authority to send B. as a constable to arrest anywhere in his county a person whom he suspects of having committed an offence for which he may be arrested without warrant. B. may as constable or private person be in a position to justify the arrest by reason of his own suspicion. He cannot, in such a case justify under A.'s (the justice's) command, and if he cannot justify by reason of his own suspicion, both A. and B. are wrongdoers, for A. cannot justify under section 22. If the constable can justify the arrest as upon his own suspicion it may perhaps be said that it was his arrest alone and not that of A. the defendant upon his command. But that is not this case, for the constable was acting under the defendant's warrant alone. He was not professing to assist the defendant in making a personal arrest upon suspicion. The warrant, and not any suspicion of his own as to the commission of the crime, was his justification. Nor was the defendant professing to arrest in the only manner and under the circumstances which entitle him to invoke the protection of section 22. He was simply directing an arrest to be made in the only way in which, under the circumstances, he could direct it, viz., by warrant. That warrant turns out to be illegal, and he cannot now turn around and assert that the arrest was (as in fact it was not) ministerial only.

Section 559 supports the view I have expressed, which, in consequence of the argument so earnestly addressed to us by Mr. Riddell, I have explained at greater length than was perhaps necessary. Upon receiving any complaint or



information the justice shall consider it, and if he thinks a case made out shall issue a summons or warrant, "and such justice shall not refuse to issue such summons or warrant only because the alleged offence is one for which an offender may be arrested without warrant." That is to say, he is not to say to the complainant: "The law permits you to arrest without warrant—without any authority. Exercise your own authority and do not ask me for a warrant."

I agree, therefore, with the court below that the defendant cannot merely on the ground of his own reasonable suspicion justify the commanding of the constable by warrant to make the arrest. The execution of the warrant, it having been in fact issued without any information in writing upon oath, lays the defendant open to an action of trespass: *Appleton v. Lepper*, 20 U. C. C. P. 138; *Friel v. Ferguson*, 15 U.C.C.P. 584; *Regina v. Hughes*, 4 Q.B.D. 614.

A question then arises as to the notice of action. The defendant contends that the notice served is defective. The plaintiff relies upon it as sufficient, and in the alternative sets up that no notice was necessary. The statement of claim sets forth two causes of action: one for the malicious prosecution of the plaintiff on a charge of arson; the other in trespass for assault and false imprisonment. At the trial the plaintiff was nonsuited, the learned judge holding as to the former, that absence of reasonable and probable cause for the prosecution had not been shown, and as to the latter, that the notice of action was defective, as it was substantially only a notice of action for malicious prosecution, and not for the trespass and false imprisonment. The judgment was set aside as to the trespass, the Divisional Court being of opinion that the notice sufficiently set forth a cause of action for that.

I am not prepared to differ from the Divisional Court on this point, as it appears to me that the notice cannot fairly be distinguished from that which we held to be sufficient in *Bond v. Coomee*, 16 Ont. App. 398, affirmed in the Supreme Court. It is a notice of action for a wrongful and illegal

arrest. It may also include a notice for a cause of action under the 1st section of the Justices Protection Act for malicious prosecution, but that can be no reason for regarding it as defective for the purpose of an action under the other section of the Act if the language is wide enough to embrace an action of trespass. *Brandt v. Craddock*, 27 L. J. Ex. Ch. 314; 3 H. & N. 958, Am. Ed. The case of *Taylor v. Nesfield*, 3 E. & B. 724, is distinguishable. There the plaintiff was entitled to recover, if at all, in an action under the 1st section, but the notice of action contained nothing to show that he intended to charge the defendant under that section. It was simply a notice of action for trespass and nothing more. As we hold the notice to be sufficient it is perhaps hardly necessary to determine whether, under the circumstances, notice was necessary. I certainly do not wish to intimate any opinion that it was not. The evidence shows that the defendant issued the warrant either in momentary forgetfulness of the fact that the information had not been actually sworn, or under some confused impression that another information which was before him was sufficient to cover the charge against the plaintiff and another person who was implicated in the alleged offence, and there is no evidence impeaching his good faith.

The principle on which we decided *Sinden v. Brown*, 17 Ont. App. 173, fully supports the defendant's right to notice of action. With reference to that case, which, as regards the question of notice of action, has been said or suggested not to be consistent with certain English authorities, I wish to add that I see no reason to recede from the opinion there expressed that the defendant was entitled to notice. Doubtless he was a trespasser as he had no authority to issue the warrant upon the conviction under the circumstances, but in issuing it he was doing an act, the nature and description of which was such as his general character of justice of the peace authorized him to do; that is to say, issuing a warrant of arrest upon an unsatisfied conviction, which upon its face purported to be enforceable

in that manner, and which the defendant in good faith believed he had the right so to enforce. The cases of *Bross v. Huber*, 18 U. C. R. 282, 286; *Cook v. Leonard*, 6 B. & C. 351, judgment of Bayley, J.; *Jones v. Gooday*, 9 M. & W. 736; *Weller v. Toke*, 9 East 364; *Bird v. Gunston*, 4 Dougl. 275; *Parton v. Williams*, 3 B. & Ald. 336, 337; *Prestidge v. Woodman*, 1 B. & C. 12; *Smith v. Hopper*, 9 Q. B. 1005; *Selmes v. Judge*, L. R. 6 Q. B. 724, and many other cases which might be referred to, amply support our judgment in that case as to the necessity for notice of action.

There is a class of cases where actions have been brought against persons, who, acting in supposed pursuance of an Act of Parliament, *e.g.*, the Larceny Act, have arrested others as having been "found committing" an offence against the Act, and the question has arisen whether they were "found committing" the offence, or were "immediately" apprehended within the meaning of the Act so as to justify the arrest. The right of the defendant in such cases to notice of action has been said to depend upon whether he bona fide believed in the existence of a state of facts which, had they existed, would have afforded a defence to the action, and it is laid down that this is the proper question in such cases to submit to the jury. Such are the cases of *Heath v. Brewer*, 15 C.B.N.S. 803; *Hermann v. Seneschal*, 13 C. B. N. S. 392; *Roberts v. Orchard*, 2 H. & C. 769; *Chamberlain v. King*, L. R. 6 C. P. 474; *Griffith v. Taylor*, 2 C. P. D. 194. But I do not concede that this formula can be in terms applied generally as a test in actions against magistrates under the second section of the Justices Protection Act. That is to say, it is not necessarily the test of whether the act can be said to have been so far done in execution of their office as to entitle them to notice. The test will be found not to fit many cases cited above in which notice was held to be necessary. These cases show, as Blackburn, J., points out in *Selmes v. Judge*, L. R. 6 Q. B. 724, that it is not universally true, that it is only where a justice has acted wrongly through a mistake of fact that he

is entitled to notice. See also *Booth v. Clive*, 10 C. B. 827, at pp. 834, 835.

There is another class of cases, of which *Agnew v. Jobson*, 13 Cox C.C. 625, is an illustration, where a justice has done some act "wholly alien to his jurisdiction," for doing which he had "no other authority than any other person in the realm, no pretence for authority or for saying that he was within the precincts of the law": *Norton v. Miller*, 2 Chitty 140. In such cases there is little difficulty in holding that the defendant is not entitled to notice of action. But neither *Sinden v. Brown*, 17 Ont. App. 173, nor the case at bar, is within either of the classes I have referred to. Upon the general question and as bearing upon the question whether a person in the position the defendant occupied in this case is entitled to notice, I may refer to *Friel v. Ferguson*, 15 U.C.C.P. 584, in which, however, the facts were peculiar and the conduct of the magistrate seems not to have been bona fide; *Caudle v. Seymour*, 1 Q.B. 889, where notice was given; *Leary v. Patrick*, 15 Q.B. 266; *Cave v. Mountain*, 1 M. & G. 257, 262; *Neil v. McMillan*, 25 U.C.R. 485; *Usill v. Hales*, 3 C. P. D. 319, at p. 323; *Cummins v. Moore*, 37 U.C.R. 130; *Venning v. Steadman*, 9 Can. S.C.R. 206, at p. 218; Paley on Summary Convictions, 7th ed., p. 406.

For these reasons I am of opinion that the appeal should be dismissed, but, as in drawing up the order of the Court below a new trial has been ordered upon the whole record, it will be proper to vary it by confining the new trial to the action of trespass. There is no reason for disturbing the judgment of the trial Judge as to the claim for malicious prosecution, nor is there anything in the judgment of the Divisional Court which indicates that they had any intention of doing so.

On the new trial it will doubtless be considered how far it is open to the plaintiff to complain of anything which took place after he was actually brought before the magistrate, which seems to have been within a few hours after his arrest; for however illegal may have been his

arrest under the warrant, and detention up to that time, the jurisdiction of the defendant attached when the plaintiff was before him charged with the offence, and his subsequent detention and commitment would be justifiable: *Regina v. Hughes*, 4 Q.B.D. 614; *In re Maltby*, 7 Q.B.D. 18, at p. 28; *Dixon v. Wells*, 25 Q.B.D. 249.

HAGARTY, C. J. O., and MACLENNAN, J. A., concurred with OSLER, J. A.

*Appeal dismissed.*

**Note:** *Jurisdiction of magistrate—Appearance of accused compelled by irregular process—Subsequent detention and Commitment—Validity of.*

In *R. v. Hughes* (1879), 4 Q. B. D. 614, the facts shewn were that the justice had issued a warrant of arrest informally and without oath; the defendant, having no knowledge of the defect, made no objection to the hearing of the charge.

The Queen's Bench Division (Lopes, Hawkins, Lindley, Manisty, Denman and Field, JJ., and Pollock, B., and Huddleston, B.) held that the irregularity in the process of bringing the defendant before the Court had no effect on the jurisdiction, and that the defendant and a person who committed perjury on the hearing were rightly convicted.

In many cases the word "charge" in no way involves a written information, and it is sufficient to shew that a person is brought before the magistrate somehow or other, and all that is necessary to give the magistrate jurisdiction is to shew that the person, being once before him, the crime with which the accused is charged is within the jurisdiction of the magistrate. Per Pollock, B., in *Re Maltby* (1881), 7 Q.B.D. 18 at page 28, citing *R. v. Hughes*, *supra*.

The case of *R. v. Hughes*, 4 Q.B.D. 614, was followed in *Gray v. Commissioners of Customs* (1884), 48 J.P. 343, by Lord Coleridge, C.J., and Pollock, B., the former referring to it as "a case of great authority, decided by no less than nine judges, and only one of those judges dissented from the

**Note—Continued.**

judgment." In *Gray's* case the Court affirmed the rule that "where a defendant is actually charged and appears before justices, and those justices have jurisdiction, and though the defendant may have been brought before the justices by illegal process, yet inasmuch as the justices have jurisdiction and they adjudicate on the case, that adjudication cannot afterwards be disputed by raising objections to the arrest." 48 J.P. 343, 344.

But where a summons for an offence under a statute relating to adulteration of food and drugs had been signed by a magistrate who had not actually heard the information, and the limitation of time within which the statute required that the summons under it should be served had expired before the hearing, and both parties appeared at the hearing, but the defendant objected to the irregularity, the conviction was quashed by the Queen's Bench Division upon the ground that there was no valid summons, and that, as the provisions of the statute had not been complied with, there was no jurisdiction. *Dixon v. Wells* (1890), 25 Q. B. D. 249.

Although the irregularity of defendant's appearance may be waived, it is necessary that he should be told what the charge is before conviction. *Re Daisy Hopkins* (1892), 56 J.P. 263, 274.

In conformity with the decisions above referred to, it has been held by the Supreme Court of New Brunswick that if a magistrate's summons is issued on an information purporting to have been sworn at a specified time and place, and the defendant appears thereon and pleads to the charge, the proceedings will not be quashed on certiorari because it is afterwards shewn that the information was not in fact sworn at such time and place. *Ex parte Sonier*, 2 Can. Cr. Cas. 121. See also Note, 2 Can. Cr. Cas. 124, 125.

## [COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE KILLAM, C.J., BAIN AND RICHARDS, JJ.

## THE QUEEN v. CROSSEN.

*Obstructing a peace officer—Consent of accused necessary to summary trial—Jurisdiction of magistrate—Cr. Code 144, 783, 786.*

1. The provisions of Cr. Code 144 fixing the punishment for which any one guilty of obstructing a peace officer shall be liable "on summary conviction," are controlled by Code sections 783 and 786, and the charge cannot be summarily tried by a magistrate except with the consent of the accused given in conformity with section 786.

ARGUED : May 16, 1899.

DECIDED : May 16, 1899.

Motion to make absolute a rule nisi granted for a certiorari.

Defendants were convicted by two Justices of the Peace for having resisted a peace officer in the execution of his duty and fined.

The grounds of the application were that the justices did not comply with section 786 of the Criminal Code, and did not ask the defendants whether they would elect to take a speedy trial before the justices or be sent for trial by a jury, the justices proceeding summarily to hear the case without asking the defendants whether they wished to be tried by a jury or not, and that the justices exceeded their jurisdiction in inflicting a fine and costs and in default imprisonment at hard labour.

*George Patterson*, for the justices, shewed cause : Defendants not having given security it cannot be agreed that the whole case should be argued. The issuing of a certiorari is a matter of discretion, particularly where an appeal lies as here. The prosecution was brought under section 144 of the Criminal Code, under which it is triable summarily. It is not an indictable offence only. The charge was really one

of resisting a person in lawful execution of the process of the Court, and comes under section 144, sub-section 2 (b), and two Justices may try such a charge summarily notwithstanding the provisions of section 783, sub-section (e). As to punishment: The justices inflicted a fine; with the word "or" this means that imprisonment was to be in default of payment of the fine. It is admitted the fines were paid to prevent imprisonment. The justices can make a proper conviction now, if the conviction be defective. They can impose hard labour in default of payment of fines; section 872. Forms FFF and GGG contain words showing imprisonment may be with hard labour. Section 955, sub-section 6, gives power to impose hard labour. The justices could amend the conviction if wrongly drawn; sections 833, 889.

*W. H. Culver, Q.C.*, for the defendants: The only provisions of the Code referring to obstructing peace officers are sections 144 and 783. In Crankshaw on The Criminal Code, p. 784, there is a list of cases which may be tried summarily, but it does not include the offence charged here; see also p. 684. The memorandum of the adjudication was of several offences; under section 845, sub-section 3, this is bad: *Reg. v. Hasen*, 23 Ont. R. 387; 20 Ont. App. R. 633. Section 955 does not apply to summary convictions under Part LVIII. Practically no punishment was awarded. Alternative penalties are bad: Clarke's Magistrates' Manual, 183. Hard labour was not authorized: *The Queen v. Horton*, 31 N.S.R. 217. The offence charged comes within the meaning of section 783, sub-section (e), of the Criminal Code, and subsequent sections, and the Justices had no right to try it summarily without following the directions of section 786 and getting the consent of defendants to be so tried.

WINNIPEG, May 16, 1899.

*Per Curiam.*—The writ of certiorari should be granted on the ground that the offence charged comes within section 783, sub-section (e), of the Criminal Code, and subsequent



sections, and that the parties could not have been tried summarily except after compliance with section 786 of the Code, notwithstanding the provisions of section 144.

Counsel for the Crown then stated he would consent to the conviction being quashed and an order was made accordingly, without costs, and protecting the Justices from any action in respect of the proceedings.

*Conviction quashed.*

## [COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE THE HONORABLE MR. JUSTICE WÜRTELE.

## THE QUEEN v. WEIR and others. (No. 2).

*Signing document by procuration without authority—Promissory note in name of an estate—Order for particulars—Names of persons representing estate—Indictment pending preliminary enquiry—Judge's direction to prefer indictment as a "consent"—Sufficiency of—Cr. Code 431, 613, 641.*

1. An endorsement made and signed by the judge upon an indictment by which he "directs" that the indictment be submitted to the Grand Jury, is a sufficient "consent" of the judge, under Criminal Code sec. 641, to the preferring of the indictment.
2. An accused against whom an indictment is preferred, under the authority of a judge's consent under Criminal Code sec. 641, is not entitled to have the indictment quashed by reason of the fact that a preliminary enquiry in regard to the same offence was at the same time pending before a justice of the peace upon which the latter had not given his decision for or against committal for trial.
3. An indictment may be laid under Criminal Code sec. 431, for unlawfully and with intent to defraud signing a promissory note by procuration, although the name signed is the name of a testamentary succession or of an estate in liquidation (e.g., "Estate John Doe"), but, if the indictment does not disclose the particulars, an order will be made against the Crown to furnish particulars of the names and capacities of the persons representing such estate at the time when the offence is alleged to have been committed, and directing that the defendants be not arraigned until after the particulars have been delivered.

MONTREAL, November 17, 1899.

WÜRTELE, J.—

Three indictments have been found against the four defendants jointly, charging them, under article 431 of the Criminal Code, with having on the 27th May last (1899), with intent to defraud and without lawful authority, made and signed, by procuration, three certain promissory notes in favor of the Ville Marie Bank, and with having with the

like intent to defraud, used the same and uttered them to the Bank. One of these notes was in the name of the "Estate F. X. Beaudry," another in the name of the "Estate Louis Perrault," and the other in the name of Charles Lionais. The three notes purport to be signed by procuration by the defendant, William Weir, the president of the Bank, and, on the date which the notes bear, the defendant, Edward Lichtenhein, was the vice-president, and the other defendants, Godfrey Weir and Frederick W. Smith, were directors of the Bank.

Before being arraigned the defendants severally moved to quash the indictments for the following reasons :

1. Because they had been preferred before the Grand Jury without lawful authorization ;
2. Because when they were so preferred an information for the offence with which the defendants were charged in them was pending before a justice of the peace, and they were entitled to have his decision, and their discharge, if he should so decide ;
3. Because there was no fact or evidence disclosed in any deposition taken before a justice of the peace at a preliminary inquiry against the defendants upon which the indictments could be found ; and
4. Because the indictments do not disclose any indictable offence.

The indictments were respectfully submitted to the Grand Jury under an authorization given by me as a judge of the Court of Queen's Bench contained in an indorsement written on their face in the following words : "I hereby direct that this indictment be submitted to the Grand Jury." It was contended at the argument that this authorization was insufficient and illegal, and that it was a direction or order, while all that the judge should have given was his consent.

Formerly any one had the right to go before the Grand Jury and prefer a bill of indictment, and the Grand Jury could also, upon their own knowledge, find an indictment,

without in either case any authorization being required, except with respect to perjury, subornation, conspiracy, obtaining money by false pretences, forcible entry, nuisance, keeping a disorderly house and indecent assault; but by article 641 of the Criminal Code, certain defined provisions for preferring bills have been enacted and are followed. Now bills are preferred, (1) When, after a preliminary inquiry, an accused person is committed by the justice of the peace for trial on the charge laid against him; (2) When the prosecutor, notwithstanding the discharge by the justice of the peace of the accused person, has himself bound over to prefer a bill and prosecute the charge; (3) When the depositions taken before the justice of the peace disclose an offence other than that for which the information was laid; (4) When the Attorney-General acts himself or directs any one to prefer a bill; (5) When any one obtains the written consent of a judge of the Criminal Court having jurisdiction in the matter; and (6) When any one obtains an order of the Court.

When application is made to a judge for his consent to prefer a bill of indictment, he is not required to summon the accused party before him, and he decides himself what matter should be submitted to him. His power to authorize the preferring of a bill is discretionary and the Court will not interfere with the exercise of the discretion vested in him. In the present cases I had before me the depositions taken at the preliminary inquiry on the charge laid against the defendants William Weir and Frederick W. Smith of having made a false bank statement, which disclose the making of the notes by procuration by the defendant William Weir, and the fact that the other defendants were directors of the Bank at the time when they were made and issued. The evidence contained in these depositions was therefore sufficient to allow bills of indictment for the making and uttering of the notes to be preferred against the defendants William Weir and Frederick F. Smith, against whom the information on which the preliminary inquiry was made had been laid, without any authorization, but not

against the two other defendants, who had not been parties in the preliminary proceeding and had not had an opportunity to cross-examine the witnesses; but, as the Crown prosecutors thought it was advisable to proceed jointly against the four defendants, they applied for the requisite authorization so as to include the defendants Edward Lichtenhein and Godfrey Weir in the indictments. This course has been held in England to be unobjectionable and legal.

The objection raised to the authorization to prefer the bills of indictment is that it should not have contained a direction but should merely have specified that the judge consented that they should be preferred, and that it should have stated to what Grand Jury this should be done. The authorization is written on the face of the indictments, and the bills show by their venue and commencement that they were to be submitted to the Grand Jury for the present term. What was required was the consent of the judge for the preferring of the bills of indictment. Now, as I signed an indorsement, not directing the Grand Jury to find the bills, but directing the Crown prosecutors to submit them to the Grand Jury, I must necessarily have consented that they should be preferred by them. I therefore disallow the first objection, which is really a criticism of the form and language used and not a serious legal objection.

The second ground of objection is that the defendants were entitled to have a decision by the justice of the peace on the charge contained in the information laid against them for having illegally made and signed the notes by procuration and for having fraudulently issued them. As a general rule accusations are brought before a justice of the peace for a preliminary inquiry, but to this rule there are exceptions, and the provision directing a preliminary enquiry does not prohibit the use of the exceptional modes of proceeding, and consequently does not confer on an accused party an absolute right to have a decision rendered by the justice of the peace on the charge laid against him. The second objection is therefore unfounded.

The third objection is that the indictments are illegal because they are not founded on evidence contained in depositions taken before a justice of the peace at a preliminary inquiry. This circumstance is, however, not required when a bill is preferred by the Attorney-General, or by his direction, or on the consent of a judge, or by the order of the Court ; and the objection, consequently, is not well taken.

The last objection is that the indictments do not disclose any indictable offence. The contention raised at the argument was that the offence consisted in the making a note in the name of another person by procuration without authority, and that no person whose name was so used is mentioned in two of the indictments ; that one of the indictments states that the note was made in the name of the " Estate F. X. Beaudry," and that the other states that the note was made in the name of the " Estate Louis Perrault." This objection does not apply to the other indictment, which charges the defendants with having made and issued a note, purporting to be the note of Charles Lionais, without authority.

It is essential in proceeding under article 431 of the Criminal Code that the person whose name has been used should be stated in the indictment, and the question here is whether any person has been indicated by the use of the denominations " Estate F. X. Beaudry " and " Estate Louis Perrault." In common parlance or popular language the denomination " Estate " is employed to signify the succession of a deceased person, or the collective rights of an insolvent, and its use is a short way to state the persons in whom the succession or collective rights are vested, and by whom such succession or collective rights are represented, and when the denomination is used by such persons themselves, or is used with their authority, as a signature to a note or other document, it is binding on them in their fiduciary capacity ; but the use of the denomination, although it indicates and may bind the persons representing such estates and in

whom they are vested, does not, it is true, describe them with precision.

Defects in indictments are either in essential matters or in merely formal matters. When the defect consists in the omission of an essential averment, the indictment must, on the application of the defendant, be quashed; but if the motion to quash is made only for a formal defect apparent on its face, as if an averment should be defective or the charge should be imperfectly stated, the Court may amend the indictment and proceed with the trial.

Article 613 of the Criminal Code specially provides that an indictment shall not be insufficient if it does not name or describe any person with precision. Such a defect is merely a formal one and is not fatal, and the proviso at the end of the article allows the Court to order, if it should be necessary for a fair trial, that a particular be furnished by the prosecutor further describing such person. This is really in effect ordering an amendment to be made to describe with precision and certainty any person connected with the offence charged and thus to correct a formal defect. The last objection is, like the three others, unfounded. I dismiss the motions to quash, of each of the four defendants in the three cases. By referring, however, to the depositions taken at the preliminary inquiry on the charge against William Weir and Frederick W. Smith, of having made a false bank statement, I see that the "Estate F. X. Beaudry" is a testamentary succession of the late Francois Xavier Beaudry, and that the "Estate Louis Perrault" is the insolvent estate of one Louis Perrault, who made an abandonment of his property some years ago for the benefit of his creditors. In conformity with the proviso of article 613 of the Criminal Code I therefore order that a particular be furnished by the Crown prosecutors, giving the names and capacities of the persons representing such estates at the date of the making and issue of the notes, and that the defendants be arraigned only after their production.

*Motions dismissed.*

*Cook*, Q.C., and *Desmarais*, Q.C., for the Crown.

*Macmaster*, Q. C.; *J. N. Greenshields*, Q. C.; *A. J. Brown*, Q. C.; *R. A. E. Greenshields*, Q. C., and *Charles Archer*, for the defendants.

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[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE THE HONORABLE MR. JUSTICE CREASE.

**THE QUEEN V. BARNFIELD.**

*Practising medicine without being registered—Vendor of patent medicines—Asking symptoms—Diagnosis—Medical Act, (B.C.)*

1. The selling of a "patent medicine" or specific for the treatment of a disease, after enquiries by the seller into the nature of the complaint and its symptoms, is practising medicine if the selection of the remedy is made by the seller; and the seller, not being a registered medical practitioner, is guilty of practicing medicine "for gain or hope of reward," although no charge is made except for the medicine.

ARGUED : September 25, 1895.

DECIDED : September 25, 1895.

Case stated by Farquhar Macrae as Police Magistrate in and for the City of Victoria, as follows :

"The information alleged that W. G. Barnfield, *alias* Sequah, of Victoria, 'within the space of three months last past, to wit, on the 28th and 29th August, 1895, at the city of Victoria aforesaid, did practise medicine for hire, gain or hope of reward, not being duly registered in accordance with the provisions of the Medical Act and amending Acts, contrary to the form of the statute in such case made and provided.' The defendant pleaded "not guilty," and after hearing the parties and the evidence of the complainant, the defendant offering no evidence, I, on the 30th August, 1895, dismissed the said information. It was proved upon the hearing that the complainant, a stonemason, went into the



A.O.U.W. Hall, in the city of Victoria, on the evening of the 28th August, 1895, and there saw the defendant extracting teeth from human beings."

"The defendant afterwards spoke from a platform, chiefly upon rheumatism, and claimed that he could cure rheumatism in ninety cases out of one hundred, and invited anyone affected with the disease to come upon the platform. Mr. Franklin went up and the defendant asked him how long he had been affected with rheumatism. Franklin, in answer to the question, stated ten or twelve years. The defendant had a bottle on the table near to him containing something called "Sequah's Cure." The defendant emptied some of the contents of the bottle into a glass and gave it to Mr. Franklin to drink, which Mr. Franklin did. The hall was at the time fairly well filled with people. The defendant invited five people to go upon the platform to see that only "Sequah's Oil" was applied to Mr. Franklin."

"The complainant along with four others from the audience went upon the platform or stage and together with the defendant's business manager or assistant left the platform or stage and went into a room in rear of same. Mr. Franklin was directed to lie down on a couch. The manager applied "Sequah's Oil" to the affected part. The defendant was present from time to time. The complainant heard the defendant say "the oil was getting a little too dry." This was while the manager was rubbing the affected part with oil. The manager pulled up Mr. Franklin's leg and he and the defendant told Franklin to kick out straight with his leg. Franklin did so once or twice. Then the manager asked where the pain was and Franklin told him. The manager again rubbed the affected part. The rubbing being stopped they all returned to the platform in presence of the audience. Franklin seated himself on a chair. After about five minutes the defendant asked Franklin if he felt any better, and then asked him to "get up and walk across the stage." Franklin got up and nearly ran across the stage. The audience laughed, as also did the defendant, the defendant saying "he was pleased with Mr. Franklin's case and the way he got

relieved." He further said those were the kind of cases he liked to get. Franklin then left the stage. The defendant stated to the audience that he cured rheumatism with "Sequah's Oil," and stated that after the meeting was over he would give anyone an opportunity to speak to him, and they could get "Sequah's Oil" for \$1.00 a bottle, or two bottles for \$1.50, or four bottles for \$3.00."

"The complainant after the close of the meeting went to the defendant and gave him information as to his symptoms, viz., that he had been in the hospital for two months during last spring, having then undergone an operation for abscess. He stated to the defendant that there was a large swelling under his hip and a discharge from the old wound two or three weeks before the date of consultation with the defendant. The complainant asked the defendant if he (the defendant) could do anything for it. The defendant said by rubbing "Sequah's Oil" right on the swelling it would throw out any discharge there was." The defendant told the complainant not to rub on the old wound at all. The complainant told the defendant he would get the oil in the morning, the defendant stating that he 'could get it at any time between ten and twelve in the morning. The complainant went back on Thursday to the defendant's office and got from the defendant two bottles paying therefor the sum of \$1.50. One bottle was called "Sequah's Oil," and the other "Sequah's Cure." The defendant had on the preceding night only spoken of the oil. The defendant explained to the complainant that the second bottle, i.e., "Sequah's Cure," was for cleaning the blood and opening the pores. The bottles were produced in court and made exhibits. The defendant, in answer to the complainant, upon the complainant being about to leave the defendant's office, said he thought the oil would cure his swelling."

"It was brought out on cross-examination by defendant's counsel, that the defendant asked Mr. Franklin if his ailment was rheumatism, and he said "Yes"; that the defendant did not make any examination of Mr. Franklin or touch Mr. Franklin's leg. Further, that the defendant stated to the

audience that anyone suffering from rheumatism would be treated free; that the complainant did not see Franklin pay anything to the defendant; that the defendant did not touch the complainant at all, or did he tell the complainant what disease he was suffering from. In answer to questions put to complainant by me (the Police Magistrate) the complainant stated that the defendant said nothing to indicate that he was a doctor, nor did he, the defendant, speak of himself or of his skill, but spoke of the virtues of "Sequah's Medicines." The defendant said the medicines would cure kidney complaints, liver complaints, and specified one or two other complaints. The defendant invited anyone who wished to consult with him, and that he would be seen any day between ten and twelve, and it was on account of this invitation that the complainant called at the defendant's office. It was admitted that defendant was not upon the "British Columbia Medical Register," or entitled to practice the profession of a chemist or druggist in the Province of British Columbia."

"I determined that the matter hereinbefore stated was insufficient to support the said information. The question for the opinion of the Court is, whether my said determination was erroneous in point of law."

*A. E. McPhillips*, for the appeal: The defendant undertook to cure certain diseases and gave advice for a consideration, namely, the furtherance of the sale of his medicines. This is practising medicine within the Act, C.S.B.C. 1888, cap. 81, sec. 41; *Apothecaries' Company v. Nottingham*, 34 L.T.N.S. 76; *Woodward v. Ball*, 6 C. & P. 577; *Reg. v. Hall*, 8 Ont. R. 407; *Reg. v. Stewart*, 17 Ont. R. at page 5.

*Frank Higgins*, contra: Defendant did not diagnose the complaints or give medical advice, he merely vended the preparation as a specific for certain classes of complaints. This is not practising medicine, *Reg. v. Howarth*, 24 Ont. R. 561; *Reg. v. Coulson*, 24 Ont. R. 246. *Reg. v. Hall*, 8 Ont.

R. 407, is distinguishable ; defendant there admitted practising medicine and charging his patient \$3.00 a visit ; here the defendant charged nothing but the price of the medicine.

CREASE, J.—

I think, under the circumstances set forth in this case stated submitted for my decision on appeal, after examining the authorities cited: *Encyclopædic Dictionary*, p. 3077, "Medicine;" *Apothecaries v. Nottingham*, 34 L.T.N.S. 76 ; *Reg. v. Hall*, 8 Ont. R. 407 ; *Reg. v. Stewart*, 17 Ont. R. 5 ; *Reg. v. Howarth*, 24 Ont. R. 561 ; *Reg. v. Coulson*, 24 Ont. R. 246 ; *Haworth v. Brearley*, 19 Q.B.D. 303 ; *College of Physicians v. Rose*, 6 Mod. 44 ; *Re Hertton*, 8 Q.B.D. 434 ; and hearing counsel on both sides, that the defendant Barnfield (*alias* Sequah) is fully entitled to sell his patent medicines as publicly as he likes, so long as they are not shewn to be inimical to the public health, and as freely as Parr's life pills, or any other patent medicine.

The mere selling without an inducement to any one is not "practising medicine" ; but he is not entitled to call upon people to submit to his personal manipulation or inspection and dispensing of his medicine to them, asking their symptoms, diseases or complaints, or treating them as he did in the cases before us with his medicines. I say nothing about his producing the individuals themselves after treatment to audiences as living "advertisements" of his success in so treating them, as the information stops half-way at the charge of his practising medicine unlawfully.

It is but common sense to say he did this for "gain or hope of reward," as the sole object of the whole thing and in every case was to sell as much of his drugs as possible. The merits and value of the "Sequah" drugs as medicine are not in the case. I find that in the cases before the Court, according to the ordinary and commonly understood meaning of the words of sec. 41 of the Medical Act, C.S.B.C. cap. 81, as required to be applied to the construction of statutes, the acts of the defendant legally amounted to "practising

medicine," and have brought him within the penal provision of the Medical Act.

This Act, it should be observed, was passed in the public interest, after very full debate and examination by the Legislature. It is a *fac-simile* also of the Act passed by the Legislature of Ontario for a similar salutary object, and has been rendered necessary for the protection of the public from being practised upon by persons incompetent to treat diseases safely and intelligently, and, like the defendant, unskilled and untrained in the safe application of medical science and remedies to the delicate and highly organized constitution of the human frame.

The decision of the magistrate, therefore, in dismissing the information was erroneous, and must be and is hereby reversed. And the defendant having so violated the provisions of the Act must be, and is hereby, fined in the sum of twenty-five dollars, the lowest sum mentioned in that behalf in the statute, together with the costs of the appeal and the costs in the Court below.

*Appeal allowed and defendant convicted.*

**Note :** *Practising medicine without license—What constitutes the offence.*

See *The Queen v. Howarth* (Ont.) 1 Can. Cr. Cas. 14 and Note to same ; and see also *The Queen v. Coulson* (Ont.) 1 Can. Cr. Cas. 114, 118.

## [COURT OF APPEAL FOR ONTARIO.]

BEFORE THE HONORABLE SIR GEORGE BURTON, CHIEF JUSTICE  
OF ONTARIO, AND OSLER, MACLENNAN, MOSS AND  
LISTER, JUSTICES OF APPEAL.

**Re M. B. LAZIER.**

*Extradition—Forgery—Signature in name of non-existent person—False representations as to identity—Authorisation of extradition proceedings by demanding country—Proof of requisition for extradition—Practice—Extradition Act, R.S.C. 1886, c. 142, ss. 6, 13.*

1. Proceedings in extradition may be regularly initiated in Canada before any requisition is made by the country entitled to make the demand for extradition.
2. Extradition proceedings in Canada are not void because, during the course of same, no proof was adduced to shew that the extradition complaint was laid under the direction or authorization of the country in which the alleged offence was committed: and it is sufficient that the requisition of the demanding country be made in due time after the commitment for surrender.
3. Where a person passing under an assumed name falsely represents that he is in the employment of a certain firm, and that he is authorized to make a draft upon such firm, his signature in such assumed name to a draft upon the firm, and his fraudulent negotiation of it, constitute forgery, if the credit obtained in negotiating the bill was not personal to himself alone, without relation to his supposed employers, and if the false name, although that of a non-existent person, was assumed for the very purpose of perpetrating the fraud.

ARGUED : March 30, and April 1, 1899.

DECIDED : May 9, 1899.

Appeal by the prisoner from the judgment of Meredith, C.J.C.P. (High Court of Justice), remanding him to custody on a motion for the prisoner's discharge in habeas corpus proceedings.

The prisoner had been committed for extradition to the United States, on four charges of forgery. The judgment appealed from was delivered on February 4, 1899, as follows :

MEREDITH, C.J. C.P.—

The prisoner has been committed for extradition to the

United States of America by the Junior Judge of the County Court of the county of Hastings, acting as extradition Judge under the provisions of R.S.C. ch. 142, upon eight charges, four of them of forgery, three of receiving money obtained by fraud, and one of obtaining money by false pretences.

The proceedings having been removed into the High Court by two writs of certiorari directed to the extradition Judge, dated respectively, November 30th, 1898, and December 24th, 1898, and the prisoner, having obtained a writ of habeas corpus, now moves for his discharge from custody.

Upon the argument of the motion various objections were taken to the regularity of the proceedings before the extradition Judge, and to the sufficiency of the material before him to justify the warrants of committal issued by the learned judge under section 12 of the Act, by the authority of which the prisoner is detained in close custody in the common gaol of the county of Hastings.

The first objection is that nothing appears on the face of the proceedings to shew that the informations or complaints laid before the extradition Judge, which are the foundations of the proceedings against the prisoner, were laid or made by or under the authority of the Government of the United States, and that they were, in fact, not so laid or made, and, that being the case, the extradition Judge acted without jurisdiction and the proceedings before him are therefore void.

If the view adopted by the Courts of the United States of the effect of the provisions of the Federal Statute (sec. 5270 of the Revised Statutes), which is the analogue of sec. 6 of the Canadian Act, is to prevail in the construction of the latter enactment, the prisoner's objection must be given effect to, for the preponderance of American judicial opinion, as the cases cited by Smyth shew, is that it must appear that the person who makes the complaint has the authority of the foreign Government for making it (Moore on Extradition, vol. I., par. 279), though Mr. Justice Lowell, in *In re J. Dugau* (1874), 2 Lowell 367, came to a different

conclusion. In some of the cases it is held that the authority must appear upon the face of the complaint, but in others it is deemed sufficient if it appear in the course of the proceedings before the commissioner, as the functionary who occupies in the United States the same position as does the extradition Judge in Canada, is called.

The practice, however, which has been adopted in Canada and has been in this respect, as far as I can ascertain, uniform, is based upon a different and I venture to think more liberal interpretation of the provisions of the Canadian Acts, and the jurisdiction of the extradition Judge has not been thought to depend upon the information or complaint being laid or made by, or at the instance and under the authority of the foreign Government, but the Acts have been treated as authorizing the extradition Judge to receive the complaint of any one who, if the alleged offence has been committed in Canada, might have made it.

Mr. Blake, the then Minister of Justice for Canada, in a communication to the Secretary of State for the Colonies, dealing with the question of the extradition arrangements existing and proposed between this country and the United States, and dated June 27th, 1876, pointed out this difference between the practice which prevailed in the two countries.

I extract the following passages from that communication :

“6. The practice in Canada has always been to apprehend, examine, and discharge or commit for extradition, without the necessity of a previous requisition from the United States ; and this practice answers well.”

“In the United States the practice has, as I am informed by a person of experience, been different, and not uniform. The subject was discussed in the case of *Kaine* in 14 Howard's Reports, and various opinions were expressed by the Judges ; and I am told that the commissioners have held in some cases that the authority or notification of the president is necessary to justify even the apprehension, and in many or most cases that this authority is necessary to justify the detention, of the fugitive, and the examination



into his case : " Dominion Sessional Papers, vol. 10, No. 7 (13), pp. 17-19.

It is true that in the case referred to by Mr. Blake, *In re Kaine* (1852), 14 Howard 103, the question which arose was not as to whether the complaint must be made by the foreign Government but to the necessity of a mandate from the President in order that jurisdiction should be conferred on the extradition Judge to act, and I refer to Mr. Blake's communication only for the purpose of shewing that his inquiry had led him to the conclusion to which I have come as to what has been the uniform practice in Canada as to the initiation of proceedings for the extradition of offenders under the Canadian Acts ; and even if I had come to the conclusion that it was founded on an erroneous view of the effect of the Canadian Act, I should not feel warranted in departing from a practice which has been so long established and so uniformly followed.

I am, however, of opinion that whatever may be the proper view of the scope and effect of the United States statute, the Canadian practice is in accordance with the provisions of the Canadian Act, which differ in important respects from those of the United States statute.

Very soon after the Ashburton Treaty was entered into, it was found that the provisions of the Imperial Act which was passed for giving effect to it (6-7 Vict., ch. 76) were unsuited to Canada, and accordingly in the year 1849 a Canadian Act was passed for giving effect within the then Province of Canada to the treaty (12 Vict., ch. 19).

In the preamble to this Act it is recited that certain provisions of the Imperial Act had been found inconvenient in practice in the Province, and more especially that provision which required that before any offender should be arrested a warrant should issue under the hand and seal of the person administering the Government to signify that the requisition had been made by the authority of the United States for the delivery of the offender and to require all justices of the peace and other magistrates and officers

of justice within their several jurisdictions to govern themselves accordingly, and to aid in apprehending the person so accused, and committing such person to gaol for the purpose of being delivered up to justice according to the provisions of the treaty, inasmuch as by the delay occasioned by compliance with the said provision, an offender may have time afforded to him for eluding pursuit, and it was by the 1st section enacted that—

“ It shall be lawful for any of the Judges of any of Her Majesty’s Superior Courts in this Province, or for any of Her Majesty’s justices of the peace in the same, and they are hereby severally vested with power, jurisdiction and authority, upon complaint made under oath or affirmation, charging any person found within the limits of this Province with having committed, within the jurisdiction of the United States of America, or of any of such States, any of the crimes enumerated or provided for by the said treaty, to issue his warrant for the apprehension of the person so charged, that he may be brought before such Judge, or such justice of the peace, to the end that the evidence of criminalty may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge according to the laws of this Province, if the offence alleged had been committed therein, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the Governor or Lieutenant-Governor of this Province, or to the person administering the government of the same for the time being, that a warrant may issue upon the requisition of the proper authorities of the said United States, or of any such states, for the surrender of such person, according to the stipulations of the said treaty; and it shall be the duty of the said Judge, or of the said justice of the peace, to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until such surrender shall be made, or until such person shall be discharged according to law.”

By order in council of March 28th, 1850, the operation

of the Imperial Act was under the authority of its 5th section suspended in Canada for so long as the provincial enactment should continue in force.

Changes have since taken place both in the Imperial and the Canadian Acts, but the Imperial statutes are under the authority of sec. 18 of the Extradition Act of 1870, 33-34 Vict., ch. 52, suspended in Canada as far as relates to the United States of America and the Ashburton Treaty, and the supplementary convention of July 12th, 1889, and for as long as the Canadian Act continues in force, by Orders-in-Council of November 17th, 1888: (Statutory Rules and Orders Revised, vol. 3, p. 181); and March 21st, 1890 (*ibid.* 1890, p. 644).

The Imperial Acts now in force are the Extradition Act of 1870 (33-34 Vict., ch. 52), and the Extradition Act of 1873 (36-37 Vict., ch. 60), and the Canadian Act is now ch. 142 of the Revised Statutes of Canada.

Sub-sec. 1 of sec. 6 of the Canadian Act is similar in its terms to sec. 5270 of the Revised Statutes of the United States as far as the latter section deals with the making of the complaint, but the Canadian Act, differing in this respect from the United States statute, provides that the extradition Judge is forthwith, after issuing his warrant for the apprehension of the offender, to send a report of the fact of the issuing of the warrant, together with certified copies of the evidence and foreign warrant, information or complaint, to the Minister of Justice (sub-section 2), and authorizes the Minister of Justice, if he at any time determines that the foreign state does not intend to make a requisition for surrender, by order under his hand and seal to cancel any warrant issued by an extradition Judge under the Act (section 15c.).

These provisions indicate, I think, that Parliament did not deem it essential that the complaint should be made by or on behalf of the foreign Government, but recognized the existing practice, which was in accordance with the policy which dictated the legislation of 1849, that it might be made by any one who might have made it had the

alleged offence been committed in Canada, and by the provisions to which I have referred, guarded against the danger of injustice being done to an accused person by the charge being made by a private individual, and the foreign Government not in the end making a requisition for his surrender, and against this country being put to the expense of the inquiry, which, if the requisition for surrender were made, ought, under the terms of the treaty, to be borne by the Government making the requisition, and which that Government would not be answerable for unless it had intervened to request the surrender. These two dangers appear to have had an important effect upon the United States Courts in bringing them to the conclusion that the complaint must be by the foreign Government, or on its behalf.

Apart from the considerations I have mentioned, I see no good reason why effect should not be given to the plain language of section 6. Why import into the section something that is not to be found, in terms at all events, in its provisions? Why must Parliament be taken not to have meant, as it says, that the complaint may be made by anyone who might have made it had the alleged offence been committed in Canada? I cannot understand that there is anything disrespectful to the Government of this country in the complaint being made by a private person directly to the tribunals constituted to examine into complaints for extradition offences, instead of through the foreign Government. It is, I think, a complete answer to such a suggestion that, upon the construction I would give to section 6, the private person makes his complaint by the express authority of the Canadian Parliament.

It was further objected that the evidence adduced before the extradition Judge was not sufficient to justify the committal of the prisoner—that it does not shew that any crime, or at all events, that any extradition crime was committed by him.

This objection, also, in my opinion, fails.

There was, I think, ample evidence of acts done by the prisoner which, if they had been done in Canada, would have justified his committal for trial on each of the four charges of forgery upon which he has been committed.

The case of *In re Cornelius Murphy* (1894), 26 Ont. R. 163, is conclusive against the prisoner on this branch of the case.

There was evidence in each case that the prisoner took an assumed name; that he assumed that name for the purpose of the fraud which he subsequently committed; that in that name he drew the bills of exchange; that the persons in whose names the bills were drawn were fictitious persons; that the prisoner falsely represented each of them to be real persons, to be in the employment of the persons upon whom the bills were drawn, and that he had authority from these persons to draw upon them for the amounts of the bills; that the bills were drawn with intent to defraud, and that in each case persons were by these means actually defrauded.

There was, therefore, I think, beyond question, evidence that the bills were false documents, and that the prisoner had been guilty of forgery in respect of them.

The Court of Appeal was, in the *Murphy Case*, equally divided in opinion as to the correctness of the decision of the Divisional Court, the present Chief Justice and Mr. Justice Osler thinking that a case had not been made for the committal of the prisoner, but for a reason that does not apply to this case, viz., that the account upon which the alleged forged cheque was in that case drawn was a genuine one, and there was no false representation as to the drawer of the cheque. In this case, as I have already pointed out, both of these elements are supplied by the evidence, and, as I understand the judgments of these learned Judges, on the facts of this case they would agree that the offence of forgery is made out.

No question such as was raised in the *Murphy Case* as to the offence, though forgery according to the law of

Canada, not being forgery according to the law of the foreign country, was raised in this case; but even if the offence were not forgery but larceny in the United States, I do not see why the prisoner should not be extradited, the offence of larceny being one of those embraced in the treaty arrangements with the United States. It would appear to me an anomalous state of things if it were otherwise, for the result would be that though an act, criminal according to the laws of both countries, and in each an extradition crime, were committed, the guilty person could not be extradited unless the offence were the same according to the laws of both countries.

I do not think that the committal of the prisoner on the three charges of receiving money obtained by fraud is warranted by the evidence. The facts disclosed in each case the offence of obtaining money or the signature to a bill of exchange by false pretences, but that is a different offence from the offence of receiving money obtained by fraud, and is not within the terms of the treaty.

Nor was the committal of the prisoner on the charge of false pretences justified. As I have said, that is not one of the offences included in the treaty arrangements with the United States, but Mr. Curry contended that, nevertheless, being one of the offences mentioned in the schedule to the Extradition Act, R.S.C. ch. 142, the Act authorized the committal of the prisoner.

I am unable to agree to that argument. The Act, differing in this respect from the previous enactments, deals not merely with the treaty arrangements with the United States, but is applicable to any and all extradition treaties between Great Britain and any foreign state which extend to Canada, and the list of crimes which the schedule contains includes offences not within the scope of the treaties with the United States, and was inserted in the Act, as section 24 shews, in order to declare how the crimes mentioned in it were to be construed for the purpose of any treaty which might exist, in which they, or any of them, are

included. As was said by Lord Russell of Killowen, C.J., referring to the corresponding provision of the English Act, "There is no doubt that in order to justify a committal the offence for which the accused is committed must come within the language both of the treaty and of the Extradition Act : " *In re Arton*, [1896] 1 Q.B., at p. 112.

Objection was also made to the admissibility of certain depositions taken in the United States. I think that the evidence was admissible upon the authority of *In re Coun- haye* (1873), L.R. 8 Q.B. 410, and *In re Weir* (1887), 14 Ont. R. 389. But, however that may be, excluding that evidence altogether, sufficient remained to warrant the committal of the prisoner on the charges of forgery.

Objection was taken also to the certificates of the extradition Judge on the stenographer's notes of the evidence, because they do not set out the names of each of the deponents, but I think they are sufficient; the depositions are fastened together and the certificates are endorsed on the back of them, and there is, besides, the affidavit of the stenographer identifying them, so that there can be no doubt as to what the certificates refer to, and they are, moreover, returned to the extradition Judge as being the evidence taken before him. Even if they were insufficient, leave might and should be given to take them off the files in order that proper certificates be supplied. The warrants for the committal of the prisoner, being, as they are, valid upon the face of them, the prisoner's motion must fail unless upon the material before the extradition Judge they ought not to have been issued. That can be determined only when that material is before us. It was to bring it before us that the writs of certiorari were issued. The evidence having been taken in shorthand by a stenographer, the notes of the evidence must be extended and the transcript verified as directed by sub-sec. 7 of sec. 590 of the Criminal Code, 1892, but there is nothing in the Act which requires that this should be done before the committal of the accused takes place, and I see no reason why it may not be made

and returned in obedience to the writ of certiorari after the return to the writ of habeas corpus is made.

Mr. Smyth further urged that there was no corroboration such as, he contended, is required under sec. 684e of the Code, but there are, I think, two answers to this objection : (1) There was the corroboration which is said to be required ; (2) the section does not apply to the preliminary inquiry before a magistrate, but to the trial of the prisoner.

What the section forbids without the corroboration it provides for is not the committal of the accused for trial, but his conviction. This was the view of the late Sir Adam Wilson (*In re Lee* (1884), 5 Ont. R., at p. 597), and is, I think, plainly the effect of the section.

The result is that the application fails and the prisoner must be remanded, but only upon the four charges of forgery.

The prisoner appealed to the Court of Appeal for Ontario from the above judgment, and the appeal was argued on March 30 and April 1, 1899.

*R. G. Smyth*, for the prisoner.

*P. J. M. Anderson* and *J. W. Curry*, for the prosecutors.

TORONTO, May 9, 1899.

BURTON, C.J.O.—

I adhere to the view which I expressed in *re Murphy* (1895), 22 Ont. App. 386 [2 Can. Cr. Cas. 578], but this seems to me to be a very different case.

The onus (the real name of the prisoner being proved) was upon him to shew that he used the name innocently and for no improper purpose. Here it was shewn that he not only assumed the false name for the purpose of committing the particular fraud, but that he represented himself as a traveller for the firm of T. Kingsford & Son, whose bill head he produced as if to shew the authority he was assuming.

It is very much like *Rex v. Dunn* (1765), 1 Leach 57,



where the prisoner pretended to be the widow of a deceased seaman and obtained a sum of money on the strength of there being an amount due to him for wages, and then signed a promissory note as Mary Wallace with intent to induce the person advancing the money to make that advance. There nine of the Judges held the crime to amount to forgery, although she professed it to be her own note and not that of another, but she obtained the credit on the faith of her being the widow of the deceased sailor, as here the draft was cashed on the faith that the prisoner was what he represented himself to be, a traveller of the firm on whom he was drawing.

I am of opinion, therefore, that this appeal should be dismissed.

OSLER, J.A.—

The prisoner was committed for extradition on four charges of forgery, two committed in the State of Pennsylvania, one in the State of New York, and one in the State of Ohio. He was brought before Meredith, C.J., under a writ of habeas corpus, and was remanded, the learned Chief Justice being of opinion that a valid cause of detention for the offence of forgery was shewn. He is now brought before us on an appeal from that decision.

For the purpose of the appeal it is sufficient to refer to the facts relating to one of the charges, the *modus operandi* adopted by the prisoner, whose real name is Marcus B. Lazier, being the same in all except that he used a different name or alias.

He went to the shop of one H. T. Achre, a dealer in groceries, at Sharpsville, Pa., and there represented himself to be M. C. Ballard, and an agent or traveller for T. Kingsford & Son, starch manufacturers, of Oswego, N.Y. As such he applied for and obtained from Achre an order for the supply of a quantity of starch, which was taken on a form ordinarily used by travellers, and purporting to be a blank form of the firm in question. Having obtained the order, he left the shop and shortly afterwards returned and

requested Achre to endorse a draft for him on Kingsford & Son for \$50, stating that it was a draft on his employers for expenses and that he had authority to make such a draft upon them for that purpose. Achre, believing these statements, endorsed the draft, and it was then presented by the prisoner to and cashed by a local bank.

There was no such person as M. C. Ballard, and the prisoner was not and had never been in T. Kingsford & Son's employment, and had no authority to take orders for them or to make a draft upon them for any purpose.

The proceedings for extradition were commenced by information taken before His Honour E. B. Fralick, Junior County Court Judge of Hastings, a Judge under the Extradition Act. The facts above stated were fully proved by proper evidence for the purpose under the Act, but there was no evidence that any of the proceedings were taken on information or complaint laid by or under the authority or direction of the Government of the United States, and it was argued that for this reason the proceedings before the extradition Judge were void and that he acted without jurisdiction. It was also contended that the evidence was insufficient to prove the offence of forgery.

I am against both these objections. As to the first: Whatever may be the practice in the United States, our practice, as long as I can recollect, has been uniformly opposed to it. With us it has always been held that proceedings in extradition might be regularly initiated before an extradition Judge just as they might be taken before a magistrate for an offence committed in our own country. The Act, section 6, in plain terms permits them to be so taken, and I think it was the necessary consequence of the legislation (12 Vict., ch. 19) referred to by the learned Chief Justice below, that the proceedings in this country might be taken not only without any warrant from our own Executive to signify that a requisition had been made by the authority of the United States for the extradition of the offender, but without any such requisition having been in fact made,

because the proof of such requisition could only be made to our judicial officers by or through the medium of our own Executive Government. Full protection is afforded to the prisoner by the provision of the Act, sec. 6 sub-sec. 2, and sec. 15, to which the Chief Justice also refers, which requires the extradition Judge who issues the warrant for apprehension of the offender forthwith to report the proceedings to the Minister of Justice.

In truth, the question which has now been raised was decided in *In re Burley* (1865), 1 C.L.J. 34, and again in *Regina v. Morton* (1868), 19 U.C.C.P. 9, where the course of legislation up to that time is traced by J. Wilson, J. It is enough if the requisition of the foreign State is made in due time after the commitment for surrender.

I am also of opinion that the evidence makes out a prima facie case of the commission by the prisoner of an extradition crime, namely, forgery, forgery at common law—under the authority of such cases as *Rex v. Dunn* (1765), 1 Leach 57; *Rex v. Peacock* (1814), Russ. & Ryan, 278; *Rex v. Bontien* (1813), ib. 260; *Regina v. Whyte* (1851), 5 Cox C.C. 290; *United States v. Mitchell* (1831), Baldwin (U.S. Cir. Ct.) 366—for, firstly, the credit was not personal to himself alone without relation to any other; he was credited upon his false representation, not as a man bearing the name of M. C. Ballard, but as M. C. Ballard, traveller and agent of T. Kingsford & Son, with authority to make the draft in question upon them and thus to give their security for the liability which might be incurred upon the bill, in other words credit was given to the bill and not to the prisoner; and secondly, the false name was assumed, not for the purpose of concealment and fraud generally, but for the purpose of the very fraud of which the false bill was the subject.

The prisoner had never used or gone by the name of M. C. Ballard. It was not his name, and he used it on this occasion to perpetrate this very fraud by making the draft in that name as if it were his own. Therefore, he made the note in the name of another as if his own with intent to

defraud ; and whether, under these circumstances, there was a person of that name or not, is, as I understand the cases I have cited, immaterial.

There is a useful discussion of the question of the forgery of fictitious names in an article in 30 American Law Review, N.S. (1896) p. 500. The circumstances I have mentioned easily distinguish the present case from that of *In re Murphy* (1895), 22 Ont. App. 386 [2 Can. Cr. Cas. 578] in which I was of opinion that the offence of forgery had not been committed, as also from that of *The Queen v. Martin* (1879), 5 Q.B.D. 34. There the prisoner, whose name was Robert Martin, gave the prosecutor a cheque for the price of goods sold to him, to which he signed the name William Martin. The prosecutor knew him well, and knew his name was Robert, but did not observe that he had signed it by a name different from his real name. The cheque was given and received as the prisoner's own cheque. He got no credit by signing it William instead of Robert, and there was nothing whatever from which the motive of the prisoner in signing a wrong Christian name could be gathered. There was, therefore, a plain case in which the credit was given to the prisoner himself, who had been known to the prosecutor for twenty years, and not to the name in which the cheque had been signed. Here the prisoner says : " This is the bill of M. C. Ballard, agent of T. Kingsford & Son, with authority to draw it upon them. I am that person." It cannot be said that under these circumstances the credit was given wholly to himself without any regard to the name or any relation to a third person.

I think that the appeal should be dismissed.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

*Appeal dismissed.*

**Note :** *Forgery by signing fictitious name.*

To constitute forgery, the instrument must be—(1) false, (not the intentional act of the one whose act it purports to

**Note—Continued.**

be); (2) of such a nature that, if genuine, it would appear to create a legal liability; and (3) made with intent to defraud.

In *Rex v. Dunn* (1765), 1 Leach C.C. 68, the accused had represented herself to be the widow of John Wallace, a deceased seaman, and in that character applied to a prize agent for prize money due to him by the Government. She exhibited what purported to be the probated will of the deceased, and thereby induced the agent to advance money to her on a promissory note, signed by her in the name of the supposed widow, for which advances the agent was to reimburse himself out of the prize money, when obtained. A conviction on a charge of forgery was confirmed on a case reserved. Nine of the ten judges in that case agreed to the following, (Leach's Crown Cases 68), as the rules governing the case :

(1) In all forgeries, the instrument supposed to be forged must be a false instrument in itself ;

(2) If a person gives a note *entirely as his own*, his subscribing it by a fictitious name will not make it forgery, the credit being there wholly given to *himself*, without any regard to the name, or without any relation to a third person ;

(3) An instrument which is uttered as the act and instrument of another, and in that light obtains a superior credit, when in truth it is not the act of the person represented, is strictly and properly a false instrument, for in that case the party deceived does not advance his money or accept the instrument upon the personal credit of the party producing it, but upon the name and character of the third person, whose situation and circumstances import a superior security for the debt ; and therefore, if in truth it is not the instrument of that third person, whose name and situation induced the credit, it is certainly a false instrument, and the intention fraudulent to the party imposed upon by it, for he believed, when he accepted the security, that he had a remedy upon it against the third person in whose name it was given and on whom he relied when he advanced the money, but, this being

**Note—Continued.**

false, he has no such remedy, and therefore is materially deceived ;

(4) If an instrument be false in itself, and by its purporting to be the act of another a credit is obtained which would not otherwise have been given, it is forgery, though the name it is given in be really a non-entity ;

(5) The case is very different if the person borrowing money upon his own note and assuming a fictitious name does so without any relation to a different person. In that case the whole credit is given to the party himself ; the lender accepts the security as the security of that person only ; he has no other remedy in view, but merely against the man he is dealing with, and the security is really and truly the instrument of the party whose act it purports to be, however subscribed by a fictitious name ; he has, therefore, a remedy upon it against the person on whose credit he took it, and consequently is not substantially defrauded.

In *Reg. v. Whyte* (1851), 5 Cox C.C. 290, the prisoner had purchased goods of a warehouseman and represented that he was in business with one Whiffen, under the firm name of Whiffen & Co. Several bills for goods so purchased were met, but finally Whyte desired the warehouseman to draw on the firm for a certain bill of goods. This was done, and the bill was accepted by him in the name of the pretended firm. TALFOURD, J., there said : "I think it will scarcely be sufficient to shew that the name of Whiffen was assumed for the purpose of fraud generally ; it must have been taken for the specific object of passing off this bill ; the carrying on business in the false name might be for the purpose of creating a false impression with a view to obtain credit. That might support a charge of obtaining money or goods by false pretences, but not a charge of forgery."

To sustain a conviction, it should appear either that the prisoner had not gone by the fictitious name before the signing, or that he had assumed the name for the purpose of committing the fraud. *Rex v. Bontien* (1813), Russe &

**Note—Continued.**

Ryan 260; *Rex v. Peacock* (1814), *ibid.* 278; *Rex v. Lockett*, 1 Leach C.C. 94; *Rex v. Sheppard*, 1 Leech C.C. 226; *Rex v. Francis*, Russ. & Ry. 209.

In a recent Georgia case a person who, in an assumed name, made a draft on another whom he falsely claimed to be his father was held guilty of forgery. *Lascelles v. The State*, 90 Ga. 347.

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[SUPREME COURT OF NOVA SCOTIA.]

BEFORE TOWNSHEND, J., GRAHAM, E.J., MEAGHER AND  
HENRY, JJ.

**THE QUEEN v. McNUTT.**

*Summary proceedings—Information signed and sworn to by person other than person named therein as informant—Necessity for re-swearing after amendment—Objection taken by accused under arrest—Waiver.*

1. An information under oath which on its face purports to be the information of a person other than the person who has signed and sworn to the same is bad.
2. Where a warrant of arrest based upon such defective information has been issued to enforce the attendance of the accused before a magistrate, and the magistrate at the opening of the trial amends the information by inserting therein, in the presence of and with the consent of the person who had signed and sworn to the information, the latter's name in the place of the name so appearing on the face of the information, it is necessary that the information should be re-sworn.
3. Where the defendant has been arrested under the warrant and when brought before the magistrate takes objection to the amended information upon the ground that it should be re-sworn after the amendment, and has the objection noted, he does not waive the objection by proceeding with the trial and cross-examining witnesses.

ARGUED: February 11, 1896.

DECIDED: March 21, 1896.

This was an appeal from a decision granting a writ of certiorari to remove a conviction under the Canada Temperance Act. There was a warrant in the first instance. The

information commenced: "The information of John M. Bigney, of etc., taken upon oath before the undersigned, Richard Bennet, etc., this 12th day of September, A.D. 1895, who says he is informed and believes that B. B. McNutt," etc., but was signed by A. W. McMillan, who swore to it.

Upon the opening of the investigation, the magistrate erased the words "John M. Bigney" and wrote over them the words "A. W. McMillan," in the presence of the latter and with his assent. Defendant's counsel raised the objection that the information should be re-sworn. This was not done.

The following note appeared in the magistrate's minutes: "Information and warrant being read in presence of defendant, the defendant through counsel acknowledged the due and regular arrest and service of warrant. Mr. Foster (counsel) objects to the information as amended, as it should be sworn to, the amendment being the change from "John M. Bigney" to "A. W. McMillan."

The defendant pleaded not guilty, and the trial thereupon proceeded.

HALIFAX, February 11, 1896.

*W. B. A. Ritchie, Q.C., and H. Borden*, in support of the appeal.

*H. McInnes*, contra.

HALIFAX, March 21, 1896.

GRAHAM, E.J.—

I am not free from doubt on the subject, but I think there must be an information upon oath where a warrant is asked.

1. Under the Summary Convictions Act, R.S.C. 1886, chap. 178, section 25, it was quite clear. Apparently, instead of incorporating this section in the Code, the legislature, in section 843, has, by reference, incorporated in the provisions relating to summary convictions, among other sections, a specific section relating to information in cases of preliminary enquiries before justices, namely, section 558.



That section is as follows : " Any one who, upon reasonable or probable grounds, believes that any person has committed an indictable offence against this Act, may make a complaint or lay an information in writing, and under oath before any magistrate," etc., etc., " such complaint or information may be in the form C.," etc.

And upon reference to that form C., as well as by reference to the warrant, form F. (section 563), it is apparent that the legislature contemplated that the information should be under oath and were unconscious of any design to change the law.

2. From this information as it stood, it could not be said who swore to its truth, Bigney or McMillan. It was bad for not being signed if it was Bigney, and, if it was McMillan, it was bad, because he was merely swearing to Bigney's information. The defendant should know who the prosecutor was. Then it was altered by the justice, without being re-sworn, when the defendant first had an opportunity of raising the objection, and then he did object in the manner indicated by the note.

3. It is contended that by going to trial the defendant waived the objection. I am of opinion that this contention is untenable : *Dixon v. Wells*, 25 Q.B.D. 249 ; see also *Blake v. Beech*, 1 Ex. D. 320. Having stated an objection, and having caused that objection to be noted, I cannot see what further thing a man under arrest can do. He cannot leave the court room ; he cannot apply to have certiorari before judgment, and he ought not to be obliged to take the chances of his point and sit mute allowing other defences to go by abstaining from cross-examining witnesses. Of course *The Queen v. Hughes*, 4 Q.B.D. 614, was relied upon by the prosecutor, and *Reg. v. Scatton*, 5 Q.B. 493, was also referred to ; see further *Reg. v. Shaw*, 10 Cox C.C. 66. In *The Queen v. Hughes* the Judges merely held that the justices had jurisdiction over something that was before them which did not require a sworn information. But it was admitted, by some of them at any rate, that a conviction in a case in which there was no information might be quashed. That

was *Blake v. Beech*. Perjury committed on the investigation, so far as jurisdiction was concerned, was another thing. Hawkins, J., pages 622, 624, 626; Pollock, B., and Lindley, J., concurring. Manisty, J., 631; Huddleston, B., 636; Denman, J., 639. Therefore I rely upon *Dixon v. Wells* subsequently decided.

This is a criminal case; it is the case of a defendant brought into Court under a warrant, not the case of a summons, and there was an objection not subsequently withdrawn.

4. In regard to the other point taken against this conviction, namely, that it did not contain a provision as to costs of distress, etc., etc., I think that could form a proper matter for amendment: *Ex parte Conway*, 31 N.B.R. 405.

The appeal will be dismissed with costs.

TOWNSHEND and HENRY, JJ., concurred.

MEAGHER, J. (dissenting)—

There is nothing to shew the ground on which the conviction was quashed. If it was because the costs of distress and of conveying defendant to gaol were not awarded, it was in my opinion erroneous.

That objection did not touch the merits of the case, and effect should not be given to it. I say this apart altogether from the provisions in the Canada Temperance Act restrictive of the powers of the Court over convictions where the penalty imposed is not in excess of that fixed by the statute.

In the notes to Hale's *Pleas of the Crown*, vol. 2, page 215, first American edition, it is said:—

“In general a mere informality in a conviction or order, having no reference to the merits of the case, ought not of itself to be the inducement for removing it, but that inducement ought to be of some substantial defect in the justice and legality of the proceedings.”

English authority is cited in support of the foregoing. It appears to me to be sound in principle, and prescribes a rule which it is safe to follow.

McMillan, the prosecutor, in his affidavit, states what took place before the justice in these words :—

“ 3. The said Bliss B. McNutt was present at all of the hearings of said information with his counsel, A. W. Foster, of Springhill aforesaid, barrister.

“ 4. When Court opened, on the 19th day of September, 1895, the proceedings took place in the following order : The information was read to defendant by the magistrate aforesaid, and said A. W. Foster thereupon said that he acknowledged the due and regular arrest and service of the warrant, and thereafter immediately the said A. W. Foster called attention to the fact of John M. Bigney's name being in the information, and the said magistrate thereupon amended said information by striking out said John M. Bigney's name and writing over the erasure thus caused the name of myself, A. W. McMillan, and this he did in my presence and with my consent, and the said A. W. Foster took thereupon the objection that the information should be re-sworn, which was the only objection taken to said information by said A. W. Foster, by said defendant, or by anyone on his behalf, and thereupon the said A. W. Foster pleaded not guilty for the defendant to said information by saying in my presence that the defendant pleaded not guilty to said information.”

The defendant's counsel called attention to the fact that Bigney's name appeared in the information, not by way of objecting to the proceedings, but for the purpose of fixing the responsibility for the prosecution upon McMillan, so that, if the defence prevailed, there would be no uncertainty as to the party liable to pay his costs. I cannot avoid the conclusion that if the intention then was to insist, or object, that the whole proceedings were invalid or irregular, (I mean to an extent sufficient to deprive the stipendiary of jurisdiction to try the complaint) it would have been done by a proper objection ; by a statement which would convey clearly and distinctly what was intended, and not, as was the case here, by merely mentioning the fact that Bigney's name appeared in the information.

After Bigney's name was struck out of the information, and McMillan's substituted, defendant's counsel objected that the information should be re-sworn. This was the first and the only objection he made. The trial thereupon proceeded, and the defendant pleaded not guilty.

It was not contended at any time that the stipendiary had no jurisdiction to try the offence because of the original defect in the information, nor because of the amendment which he made thereto. An adjournment was not asked for, nor was it urged that a new summons or warrant was necessary.

If, as I believe, the object of calling the stipendiary's attention to Bigney's name in the information was to ascertain definitely who the prosecutor was, that purpose was accomplished by the change made. Although I entertain the opinion that a sworn information is necessary to enable the justice to issue a warrant in the first instance, I have no doubt, nevertheless, that a defendant may so conduct himself upon the trial as to forfeit the right to insist that a certiorari shall issue to quash the conviction founded upon an unsworn information.

The defendant was represented by counsel upon the trial and had a fair trial. Upon the evidence there cannot be the smallest doubt that he was guilty of the charge, and was very properly convicted. If the admission made by his counsel at the outset of the trial was true, and I do not think he ought to be allowed to dispute its truth, there was no need of any further information or warrant. He was then properly before the stipendiary for trial. The stipendiary was not asked at any stage of the trial to dismiss the complaint because of any alleged defect in the proceedings. Nor was any remonstrance made against the trial proceeding.

There being very clear evidence of his guilt, I think the defendant should shew distinctly that the admission made by his counsel was not intended to delude the stipendiary into the belief that the defendant was properly before him, and that the question of jurisdiction, founded upon the alleged defect, was distinctly raised.

He has not done either of these things. The facts disclosed were well adapted to lead the stipendiary to believe that the objection made at that stage of the trial did not, and was not intended to, raise a question of jurisdiction at all.

If the admission went beyond what I have suggested its purpose was, or if it was intended to insist upon the defect in the information, why was the admission made at all? It was not called for on defendant's behalf. It was not necessary for any purpose in defendant's interests, otherwise than I have mentioned. If the warrant was bad by reason of the defect in the information, the arrest was illegal and the admission was untrue. It would be altogether absurd to suppose that counsel would urge the minor objection while making an admission which would remove the greater one, or at least seriously impair its force, if the point taken had reference to a matter of jurisdiction. It appears to me the defendant did not then consider there was any objection affecting the jurisdiction open to him upon the face of the proceedings; or if there was, he was willing to forego it and would not urge it.

Several adjournments of the trial were made; one of them at the defendant's instance, extending over a period of fully three weeks. The defendant, no doubt, was meantime bailed. If wrong or injury was likely to come to the defendant from the character of the proceedings as they stood when he was called upon to answer the charge, he could, it appears to me, have given bail and procured an adjournment without prejudice to his rights. At all events, he could have brought to the stipendiary's notice the fact that, owing to the errors in the proceedings, he had no jurisdiction to try him upon the complaint. If he had done this, the stipendiary might have given effect to the objection and dismissed the charge.

In *Regina v. McMillan*, 2 Pugsley (N.B.) 112, Allen, J., who gave the judgment of the Court, said :—

“The only other objection in the case worthy of notice is

that the information is not under oath. On the day of the trial, defendant attended by her counsel and put forward this amongst other objections, but did not ask for any delay or adjournment of the trial. The justices proceeded with the trial. Defendant's counsel cross-examined the witnesses, and, upon clear proof of the offence charged, the justices convicted the defendant, and it does not appear that she has been in any way misled or prejudiced by the alleged defect in the information."

"Under these circumstances we think the case is governed by the first section of the Summary Convictions Act, which declares 'that no objection shall be allowed to any information or summons for any defect in form or substance, or for any variance between such information or summons and the evidence, unless the party has been misled, when the justice may adjourn the hearing till a future day.' See also *Regina v. Mason*, 29 U.C.Q.B. 433, and *Regina v. Clarke*, 20 Ont. R. 642."

In *Shepherd and Turner v. The Postmaster-General*, 10 Cox C.C. 15, the appellants were apprehended and charged at Petty Sessions with a felony under 24 and 25 Vict., ch. 97, sec. 10, for setting fire to letters in a pillar box. They were remanded and admitted to bail to appear at a subsequent sessions. At the subsequent sessions the charge of felony was abandoned, and one for a misdemeanor, under sec. 52, for wilful damage to personal property with intent, etc., proceeded with. No objection to this was made on the part of the appellants, but the hearing of the misdemeanor was proceeded with and the witnesses cross-examined by the appellants' advocate, who, at the close of the evidence, objected that as no information on oath had been taken on the misdemeanor, as required by section 62, and the appellants were not found committing the offence, the magistrate had no jurisdiction to convict. The objection was overruled, and the appellants summarily convicted.

Cockburn, C.J.—

"No doubt in strictness the appellants might have demanded to be called on to answer the charge that was

proceeded with, and that the evidence should be gone through again on the charge of misdemeanor. But they waive all right to have that done by their conduct by allowing the charge to be proceeded with."

Crompton, J.—

"I am of the same opinion. The objection to the conviction is really that there was no information and no summons, as required by section 62 of 24 and 25 Vict., ch. 97. An information and summons are not necessary in all cases; for, under section 61, if a man is found in the act of committing an offence against the statute, he may be apprehended at once. Here the defendants were in custody upon a charge of felony, and, being so, a new charge for the misdemeanor was preferred against them. If they had applied, it may be that the magistrates would have adjourned the case. But no such request was made; on the contrary, their advisers chose to go on with the new charge and cross-examine the witnesses. Then they object that their clients were not properly in custody, there not having been any information or summons to ground the charge of misdemeanor. I think that we may assume that a proper minute of the charge was made at the time, and that would be a sufficient information or complaint; and the want of a summons would be covered by the defendants' being present. I therefore think the conviction ought to stand."

Mellor, J.—

"I am of the same opinion. Although the appellants may have been irregularly taken into custody as for a felony, that did not prevent the magistrates proceeding with the case of misdemeanor if the appellants did not object."

Shee, J., concurred.

The accused had been arrested, as I have shewn, upon a charge of felony, and several witnesses were examined and cross-examined. They were then remanded for one week, but were bailed. When the case came on again the prosecutor dropped the charge of felony and said he would proceed under the 52nd section of the Act, which involved a misdemeanor only. The accused were asked whether they

would plead guilty to such charge, or whether further evidence should be offered in support of it. A conference took place between the attorneys, at the close of which the attorneys for the accused informed their opponents they must go on and prove their case. At a later stage the objection already referred to was made, and the attorneys for the accused, without waiving their objection and without prejudice thereto, addressed the magistrates.

Section 62, referred to in the opinion of Crompton, J., provides that where any person shall be charged on the oath of a credible witness, before any Justice of the Peace, with any offence punishable on summary conviction under this Act, the justice may summon the person charged to appear, etc.

The case last mentioned is reported in 5 B. & S., 756 with greater detail than in Cox's Criminal Cases, and the opinions are given at greater length, and some of the observations made appear to go further to support the conclusion I have reached than the opinions reported in Cox.

Section 62, which I have in part quoted, is quite as strong as the provisions of the statute involved in the present case in requiring the information to be sworn to.

*Dixon v. Wells*, 25 Q.B.D. 249, has, I submit with deference, no application here. That case was decided upon the special provisions of a statute relating to a particular subject, and the Court felt itself bound to hold that its provisions in regard to procedure were strongly imperative. This is made abundantly clear by the reasoning of Lord Coleridge, C.J., at page 257, where, after referring to *Reg v. Hughes*, 4 Q.B.D. 614, he said :—

“But it seems to me that in this case the legislature has made it a condition precedent to the magistrate's jurisdiction that the proceedings should be brought within the operation of section 10, and that in all prosecutions under the Act certain things shall be done and certain things shall not be done. The section is not only directory but strongly imperative. In the present case there was in my opinion no summons. I think that according to section 10, which



applies to this case, it was essential to the jurisdiction that it should be exercised in twenty-eight days, and that it was not so exercised."

Mathew, J., took the same view. The defendant in that case objected that there was no summons and no information, that the whole proceeding was irregular, and that the Court had no jurisdiction to try him because he was not properly brought there. The course taken by the defendant in the case before us was, I think, the opposite of that.

Lord Coleridge, in dealing with the objections made, used language which I think we cannot overlook in the present case. He said :—

"Of course it is assumed that if he had made no protest the cases cited would have been applicable, but his protest makes a marked distinction. I do not, however, feel able to decide in his favour on that point alone, for although the fact of his protest ought to be a complete answer to the assumed jurisdiction, I cannot disguise from myself the fact that from the language of many of the Judges in *Reg. v. Hughes*, 4 Q.B.D. 614—although, perhaps, not necessary for the decision of the case, and the judgments of Erle, C.J., and Blackburn, J., in *Reg. v. Shaw*, 34 L.J.M.C. 169—they seem to assume that if the two conditions precedent of the presence of the accused and jurisdiction over the offence were fulfilled, his protest would be of no avail. It would have been easy to say that a protest would have made a difference, but I find no such qualification in *Reg. v. Hughes*, although something like that is said in one of the cases."

The appeal should, in my opinion, be allowed.

*Appeal dismissed, Meagher, J., dissenting.*

**Note :** *Jurisdiction of magistrate—Irregularity in information.*

See *Ex parte Sonier*, 2 Can. Cr. Cas. 121, and note to same, 2 Can. Cr. Cas. 124, 125 ; and see *McGuinness v. Dajoe*, ante page 139, and note to same, ante page 150.

[SUPREME COURT OF THE NORTH WEST  
TERRITORIES.]**Re McARTHUR'S Bail.**

*Recognisance of bail—Estreat—Discretionary discharge—  
Jurisdiction—Court en banc—Civil proceeding—Cr. Code  
922.*

1. An order made under Cr. Code, sec. 922 for the discharge of a forfeited recognizance is a civil and not a criminal proceeding.
2. The discretionary order for the discharge of a forfeited recognizance authorized by section 922 of the Criminal Code to be made by the Court into which any writ of fieri facias and capias issued under part LIX. of the Code is returnable, must be made by the Court en banc, and not by a single Judge.

DECIDED : June 11, 1897.

W. and W. were sureties by recognizance for the appearance at trial of one McArthur, charged with theft of cattle. McArthur failing to appear, the recognizance was duly estreated and a writ of fieri facias and capias issued to the sheriff of the Judicial District of Northern Alberta against the sureties. Under this the sheriff made a levy.

The Criminal Code in part LIX. relating to recognizances provides as follows (section 922): "The Court, into which  
"any writ of fieri facias and capias issued under the  
"provisions of this part is returnable, may inquire into the  
"circumstances of the case, and may in its discretion order  
"the discharge of the whole of the forfeited recognizance, or  
"sum of money paid or to be paid in lieu or satisfaction  
"thereof, and make such order thereon as to such Court  
"appears just; and such order shall accordingly be a  
"discharge to the sheriff or to the party, according to the  
"circumstances of the case."

An application was made under the above section of the Criminal Code, on behalf of the sureties, to the Judge who presided at the trial Court at which McArthur had been bound over to appear, for an order discharging the

forfeited recognizance. The Judge made an order that upon payment of certain costs and compensation to the owner of the stolen cattle, the sheriff should withdraw from seizure and return all moneys or securities deposited with him by the sureties, and discharging the sheriff from all duties and liabilities in connection with the writ.

An appeal was brought on behalf of Her Majesty from that portion of the order directing withdrawal from seizure, return of moneys or securities, the discharge of the recognizance, and the discharge of the sheriff from all duties and liabilities in connection with the writ.

An objection was taken to the jurisdiction of the Court to hear the appeal, on the ground that it was an appeal in a criminal matter, for which there is no provision.

REGINA, N.W.T., June 11, 1897.

THE COURT, sitting en banc, held, following *In re Talbot's Bail*, 23 Ont. R. 65, that the order in question was a civil proceeding, and consequently that the Court had jurisdiction to hear the appeal from it.

*Held*, also, that orders under section 922 of the Criminal Code can be made by the Court en banc only, and that the single Judge had no jurisdiction to make the order in question.

*Appeal allowed with costs.*

*A. L. Sifton*, Crown Prosecutor, for appellant.

*Costigan*, Q.C., for respondents.

## [SUPREME COURT OF CANADA.]

BEFORE TASCHEREAU, GWYNNE, SEDGEWICK, KING AND  
GIROUARD, JJ.

**SLEETH v. HURLBERT.**

*Canada Temperance Act—Search warrant for liquors—Description of premises to be searched—Inclusion of various places in one warrant—Invalid warrant as a justification to officer executing it—Certiorari—Order quashing search warrant for liquors—Replevin against constable—Judgment in rem—Res judicata—Cr. Code 18.*

1. A search warrant for intoxicating liquors issued under the Canada Temperance Act is not invalid because it does not shew on its face that the premises directed to be searched are within the territorial jurisdiction of the magistrate.
2. It is not necessary that the premises directed to be searched should be described in the search warrant by metes and bounds or with other particularity of a like nature, and a direction to search the dwelling house of a named person in a certain township is sufficient.
3. A direction to search several buildings or places in respect of any one charge may be made by the one search warrant.
4. A warrant affords absolute justification to the officer executing it if it has been issued by competent authority and is valued on its face, although the warrant may in fact be bad and although it be set aside by reason of a failure to comply with legal requirements.
5. A judgment on certiorari quashing a search warrant for intoxicating liquors issued under the Canada Temperance Act does not constitute a judgment *in rem* in respect of the liquors seized.
6. A judgment on certiorari quashing a search warrant for intoxicating liquors issued under the Canada Temperance Act is not *res judicata* as to the constable who executed the warrant, if he was not a party to and had no notice of the certiorari proceedings.

ARGUED : October 30, 1895.

DECIDED : February 18, 1896.

Appeal from the judgment of the Supreme Court of Nova Scotia, 27 N.S. Rep. 375, affirming the order to restore goods to the plaintiff, James Henry Hurlbert, in an action of replevin in the court below in which the present appellant Joseph Sleeth is defendant. Upon an information laid in a case of *The Queen v. Hurlbert*, 27 N.S. Rep. 62, the plaintiff's

premises were entered under a search warrant issued by a stipendiary magistrate and certain intoxicating liquors with the vessels containing them found there were seized and removed from the premises and kept in legal custody. Upon the hearing, the magistrate made an order for the destruction of the goods seized under the provisions of the Act, whereupon they were destroyed, notwithstanding that they had been in the meantime replevied in this action. The proceedings were removed to the Supreme Court of Nova Scotia by certiorari and the declaration of forfeiture and the search warrant were set aside and quashed. This order was proved on the trial in the present case, and the trial judge adopting the judgment which quashed the warrant and order as being void for want of jurisdiction in the magistrate issuing them, held that the plaintiff was entitled to recover. The court in appeal also considered itself bound by the judgment which quashed the warrants and affirmed the judgment in the court below.

*Orde* for the appellant: The judgment quashing the warrant was not a judgment *in rem*. Taylor on Evidence, 7th ed. vol. 2 pp. 1401-2. If it was, it is only conclusive against all the world as to title to the goods, but did not prevent the officer justifying under the warrant. *De Mora v. Concha*, 29 Ch. D. 298; *Bailey v. Harris*, 12 Q.B. 905. The warrant showed jurisdiction on its face which is all that is necessary. *Howard v. Gosset*, 10 Q.B. 359; Chaster on Executive Officers, 3rd ed. p. 342. It was sufficient that the warrant followed the prescribed form. *Reid v. McWhinnie*, 27 U.C. Q.B. 289; *Truax v. Dixon*, 17 Ont. R. 366; *Re Allison*, 10 Ex. 561. The officer could justify under the warrant after it was quashed. *Codrington v. Lloyd*, 8 A. & E. 449.

*Roscoe* for the respondent: The judgment quashing the warrant was a judgment *in rem*, binding on all the world. *DeMora v. Concha*, 29 Ch. D. 268; *Geyer v. Aguilar*, 7 T.R. 696. It is essential that the warrant should give the situation of the premises. *The King v. Hasell*, 13 East 139.

SEDGEWICK, J.—

The first question to be determined in this appeal is as to the validity of the search warrant under which the goods replevied were seized or held in custody by the appellant. If that warrant was bad then the appeal fails, for I do not propose in this case to discuss the point as to whether in Nova Scotia replevin will lie to regain possession of goods *in custodia legis*.

The second question is: Assuming the warrant to be good, does it afford protection to the officer executing it, and those assisting him, even though it may have been subsequently quashed as invalid by a court of competent jurisdiction? And the final question is (in the event of the second being answered affirmatively), as to whether the present appellant is concluded by the judgment of the Supreme Court of Nova Scotia in reference to the legality of the warrant, although he was not a party to, and had no notice of, the proceedings which culminated in its being set aside. In other words, is it *res adjudicata* as to him?

As to the legality of the warrant. The following is the warrant under which the goods were seized :

SEARCH WARRANT—C. T. ACT.

CANADA :  
Province of Nova Scotia, County }  
and Town of Yarmouth.

To all or any of the constables or other peace officers in the County of Yarmouth :

Whereas Peter O. Carroll, of Yarmouth, in the said county and town of Yarmouth, inspector appointed by the town council of the town of Yarmouth for the purpose of enforcing and carrying out the provisions of "The Canada Temperance Act," hath this day made oath before me, the undersigned, one of Her Majesty's justices of the peace in and for the said county of Yarmouth, and stipendiary magistrate for the town of Yarmouth, that he hath just and reasonable cause to suspect, and doth suspect, that intoxicating

liquor is kept for sale in violation of the second part of "The Canada Temperance Act," in the dwelling house, hotel, outhouses and premises of J. Henry Hurlbert, hotel keeper, of Yarmouth in the said county of Yarmouth: These are therefore, in the name of Our Sovereign Lady the Queen, to authorize and require you, and each and every of you, with necessary and proper assistance to enter in the day time into the said dwelling house, hotel, outhouses and premises of the said J. Henry Hurlbert, and there diligently search for the said intoxicating liquor; and if the same, or any part thereof, shall be found upon such search, that you bring the intoxicating liquor so found, and also all barrels, kegs, cases, boxes, packages and other receptacles of any kind whatever containing the same, before me to be disposed of and dealt with according to the law.

Given under my hand and seal, at Yarmouth, in the said county and police division of Yarmouth, this 17th day of December, in the year of our Lord 1891.

NATHAN HILTON, J.P.,

*Stipendiary Magistrate.*

This document, the appellant contends, follows the form prescribed by the Canada Temperance Act, c. 106 R.S.C. sec. 108, and form 72 and sec. 10 of the amending Act 51 Vict., (1888) c. 34. Section 14 of that Act provides that the forms given in the schedule shall be sufficient, section 108 in the original Act only going so far as to enact that the "search warrant under that section may be in the form N." It is for us to say whether it does follow the form within the intention of Parliament, and if it does, then in my view we are bound to hold it sufficient.

Now the ground upon which the document was set aside was that it did not appear on the face of the warrant that "the dwelling house, hotel, outhouses and premises" referred to therein were within the town of Yarmouth, and consequently within the jurisdiction of the stipendiary magistrate who issued it; that therefore the warrant was bad on its face and did not justify the constable acting under it. But does

the statute or the form require a description of the premises to be searched as thus contended? I do not think so. There is nothing in the form from which it can be gathered that the premises to be searched are to be described by metes and bounds, or otherwise. In the form the words are "dwelling house, &c.;" that "&c." undoubtedly refers, and refers only, to the other places set out in the Act, "any dwelling house, store, shop, warehouse, outhouse, garden, yard, croft, vessel, or other place or places." It does not, even by implication, direct the magistrate to describe, as is ordinarily done in a conveyance, the boundaries of the suspected premises. I am clearly of opinion that the warrant complies with the statutory form, and inasmuch as the statute declares a warrant in that form to be sufficient I must hold this warrant to be valid on its face, and therefore (subject to qualifications stated below) a justification to peace officers acting under it.

The legality of the warrant was impugned upon another ground not decided by the Supreme Court. That part of sec. 10, c. 34 of 51 Vict. which authorizes a warrant is as follows:

"Such officer may grant a warrant to search in the day time such dwelling house, store, shop, warehouse, outhouse, garden, yard, croft, vessel, or other place or places for such intoxicating liquor."

The warrant authorized the search of the "dwelling house, hotel, outhouse and premises" of Hurlbert. And it was contended that the warrant was bad, because while the authority of the statute was disjunctive, only authorizing a search of the hotel or premises, the warrant purported to authorize a search of the hotel and premises. I cannot appreciate the force of this contention. The statute is not disjunctive. It authorizes the officer to search "places," more than one place. The magistrate in his warrant may specify the different buildings or premises, or places where the liquor is suspected to be, and authorize a search in each and all. It would be absurd to suppose that the Legislature intended that for each place where liquor was suspected to be, a separate search warrant was to issue. If one has to search for a thing, it is



implied that he may have to go to many places to find it. The object is to get the thing, and the statutory warrant is made so wide that the officer may go anywhere within his territory to find it.

I feel bound in this connection to observe that in my view, apart from the statute, it is not by common law necessary that the warrant should state affirmatively that the place to be searched is in a place within the jurisdiction of the magistrate who issues it, or the officer directed to execute it. A murder is committed in Ottawa by John Smith, of Montreal. A magistrate here by his warrant states that John Smith, of Montreal has committed, or has been charged with the crime of murder at Ottawa, and authorizes an officer to arrest him. That officer has jurisdiction only within the City of Ottawa or the County of Carleton. He can exercise his jurisdiction within these limits only, unless a justice in another county backs the warrant. But if within his jurisdiction he finds and arrests the accused, he is not amenable to civil consequences, nor may the accused be discharged on habeas corpus because the warrant did not allege that Smith resided or was within the magistrate's or officer's jurisdiction.

The next question is whether the appellant can rely upon the warrant as a defence although it was afterwards quashed by the Supreme Court as being irregularly issued. Before the passing of the Imperial Act 24 Geo. II., c. 44, an Act passed for the security and protection of inferior peace officers, they were placed in the hazardous predicament of being liable to indictment if they refused to execute the warrants of justices of the peace, and to vexatious actions if they did. It was the object of that Act to relieve them from this difficulty and to substitute the magistrate by whom the warrant was granted and who was supposed to be cognizant of the legality of it, in lieu of the officer who was merely the instrument to execute it, and who was probably ignorant of the grounds on which it was issued.

Paley, page 426, says :

“ As the law stood before, the distinction was that if the

justice had no authority in the matter so that the conviction was *coram non judice*, and void, his warrant afforded no protection to the officer, but if the justice had jurisdiction in the matter the officer was protected, provided the manner of the execution was legal, however erroneous the judgment might have been and though the magistrate himself might be liable."

In the report of the Royal Commissioners upon a draft criminal code submitted to the Imperial Parliament in the year 1880, which commission was composed of Blackburn, Barry and Lush, JJ. and Sir James Fitzjames Stephen, Q.C., they say:

"The result of the authorities justifies us in saying that whenever a ministerial officer who is bound to obey the orders of a court or magistrate (as for instance in executing a sentence or effecting an arrest under warrant), and is punishable by indictment for disobedience, merely obeys the order which he has received he is justified, if that order was within the jurisdiction of the person giving it. And we think that the authorities shew that a ministerial officer obeying the order of a court or the warrant of a magistrate is justified, if the order or warrant was one which the court or magistrate could under any circumstances lawfully issue, though the order or warrant was in fact obtained improperly, or though there was a defect of jurisdiction in the particular case which might make the magistrate issuing the warrant civilly responsible, on the plain principle that the ministerial officer is not bound to enquire what were the grounds on which the order or warrant was issued, and is not to blame for acting on the supposition that the court or magistrate had jurisdiction."

And this view of the law was adopted by the Canadian Parliament; see article 18 of the Criminal Code, 1892. In *Savacool v. Boughton*, 5 Wend. 170, a leading American case on the subject, Mr. Justice Marcy, after reviewing many English and United States authorities, says:

"The following propositions, I am disposed to believe, will be found to be well sustained by reason and authority.

That when an inferior court has not jurisdiction of the subject-matter, or having it has not jurisdiction of the person of the defendants, all its proceedings are absolutely void ; neither the members of the court nor the plaintiff (if he procured or assented to the proceedings) can derive any protection from them when prosecuted by a party aggrieved thereby."

If a mere ministerial officer executes any process upon the face of which it appears that the court which issued it had not jurisdiction of the subject matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it.

If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the person or place, the officer who executes process in such suit is no trespasser unless the want of jurisdiction appears by such process. Bull, N.P. 83 ; Willes 32, and the cases there cited by Chief Justice Willes ; and he proceeds to say, having reference to the case then under consideration :

" I am of opinion that the execution issued by the justice to the defendant, it being on proceedings over the subject-matter of which he had jurisdiction, and the execution not shewing on its face that he had not jurisdiction of the plaintiff's person, was a protection to the defendant for the ministerial acts done by him by virtue of that process."

The point was incidentally discussed in the celebrated case of *Howard v. Gosset*, 10 Q.B. 359, where the validity of general warrants was under consideration. In that case Mr. Justice Coleridge refers to what was said by Willes, C.J. in *Morse v. James*, Willes 122, 128 : It has always been holden that a constable may justify under a justice's warrant in a matter wherein the justice had jurisdiction, though the warrant be never so faulty, as being "too strong and general to be quite accurate." In my view that contention is well founded, but the circumstances in that case did not demand a precise statement as to the extent of the inaccuracy.

On the whole question further reference may be had to the following cases : *Phillips v. Biron*, 1 Strange 509 ; *Parsons v. Lloyd*, 2 Wm. Bl. 845 ; *King v. Harrison*, 15 East 615,

note *d*; *Wolley v. Clark*, 5 B. & Ald. 746, and *Codrington v. Lloyd*, 8 A. & E. 449, in which case both counsel conceded that the officer could justify. The general principle running through all these cases and authorities is that even though a warrant may in fact be bad, though it may be or has been set aside by reason of failure to comply with legal requirements, if it has been issued by competent authority, by a functionary duly authorized by statute or otherwise, and is valid on its face, it will afford absolute justification to the officer executing it, not only where he is proceeded against criminally but by civil action as well. The result is that upon this point, the appellant succeeds. The warrant being valid on its face, and having been issued by a magistrate with admitted jurisdiction, he was justified in acting under it.

The question still remains :—The Supreme Court of Nova Scotia having by independent proceedings taken at the instance of the respondent, but behind the back and without the knowledge of the appellant, and long after the action against him had been instituted, quashed the warrant under which the appellant acted, is he bound by that judgment—a judgment in a proceeding in which he was neither party nor privy? Is he estopped or precluded in the present action, from asserting that that judgment was erroneous? I am willing, for the purposes of this appeal, to admit that the answer to this question depends upon the answer that can properly be given to the further question—Was the judgment given by the Supreme Court as to the sufficiency of the search warrant a judgment *in rem*, or a judgment *in personam* or *inter partes* only? It is a harsh doctrine—a doctrine that may be used to the unjust destruction of individual rights and interests, the jurisprudence as to the universally binding efficacy of judgments *in rem*; but it is a doctrine too firmly established to be successfully impugned. But what is its extent? A judgment *in rem* is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper

and accredited quarter that the status of the thing adjudicated upon is as declared, concludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication. (See cases cited in the *Duchess of Kingston's case*, 2 Sm. L.C. 9th ed. p. 812.) It is true that in the present case, the Supreme Court set aside or quashed the search warrant, but it did not pass upon or adjudicate the question whether the liquors seized had or had not become forfeited to the Crown. By virtue of its general common law jurisdiction to revise and supervise the proceedings of all inferior tribunals within the province with the view of preventing any from acting in excess of its statutory or other power, it may by certiorari bring such proceedings before it, examine upon their legality, and determine accordingly. It therefore had a right to examine and adjudicate upon the sufficiency of the warrant in question. It had authority to say whether it was valid or invalid on its face, whether all preliminary steps had been taken justifying its issue ; whether in short upon grounds apparent from reading it, or upon grounds determined by evidence, it was in law a valid instrument ; but that is an altogether different thing from its right to adjudicate upon the "status" of the property in reference to which the warrant was issued. It has not either by common law or statute the right to adjudicate upon that question. For that purpose Parliament has provided the requisite tribunal and when that tribunal has passed upon it its judgment may be binding upon the world as a judgment *in rem*, subject to the review of the statutory appeal court, but so far as I can see the Supreme Court has not been vested with any right to adjudicate upon the property right, and therefore its judgment as to the legality of process cannot be viewed as a judgment determining status, but only as adjudicating on the legality of procedure.

One consideration, it seems to me, adds force to this argument. Suppose a summons issued against a person charged with offending against the Act, and a search warrant issued at the same time ; suppose the warrant bad, and the Supreme Court had quashed it on the day it was issued. I

know of no principle that would preclude the magistrate from issuing a new warrant and deciding upon the question of forfeiture when he decided upon the question of guilt. Upon the whole question I refer to *Rex v. Wick*, 5 B. & Ad. 534 ; *Reg. v. Clint*, 11 A. & E. 624, note ; *Reg. v. Evenwood*, 3 Q.B. 370.

In my view the judgment of the Supreme Court as to the sufficiency of the warrant does not create an estoppel.

In the respondent's factum the question is raised as to his right to recover because the appellant tasted or tested the seized goods. The question does not call for much consideration. It was his duty to make a test so as to be able to give evidence as to the character of the goods he had seized. On this, as well as on the ground of *de minimis*, that contention fails.

On the whole, I am of opinion that the appeal should be allowed and the action dismissed, the appellant to have the costs of this appeal and all costs in the courts below.

GWYNNE, KING and GIROUARD, JJ. concurred.

TASCHEREAU, J. (dissenting).—

I would dismiss this appeal without hesitation. Whether the warrants were void and illegal cannot now be questioned by the present appellant. The judgment declaring them to be so is as to him *res judicata*, whether such a judgment is to be considered as *in rem* or *in personam*, and that with retrospective effect to their inception. He, as an officer of the court or standing in the position of an officer of the court, or one over which the court, as the Court of Queen's Bench in England, has control, has no *locus standi* to controvert the decision of the court in the matter. If any one is bound by a judgment of this nature surely it must be in this case the magistrate, and *a fortiori* the appellant. Upon this ground alone the appeal should, in my opinion, be dismissed.

Were it necessary, I might further say, to determine the point, that the appellant would find it difficult, in my mind,

to justify the detention of the goods outside of the jail, under the verbal order of the magistrate to keep them in the jail. Moreover, the appellant has failed to establish the legality of such a verbal order in such a case. He does not justify under any warrant.

Whatever might be his position if this was an action for damages, I do not think that he has any right to these goods, nor ever had any. In fact, as I said, that is conclusively determined by the court in a case where Carrol, the plaintiff, represented him, the present appellant.

The judgment would also seem to me to be a judgment *in rem*. That would make the case still clearer against the appellant.

*Appeal allowed with costs.*

**Note:** *Res judicata in criminal matters.*

See Note, 2 Can. Cr. Cas. 496-498, and *The Queen v. Monaghan*, 2 Can. Cr. Cas. 488.

[HIGH COURT OF JUSTICE, ONTARIO].

BEFORE BOYD, C., FERGUSON AND ROBERTSON, JJ.

**THE QUEEN v. CHARLES MOUNT.**

*Liquor license—Sale to interdicted person—Liquor delivered on his order but consumed by others—Order of interdiction—Requisites of—Ontario Liquor License Act, sec. 124.*

. An order made by a magistrate under sec. 124 of the Ontario Liquor License Act, forbidding the sale of liquor to a person named, is invalid to support a conviction for a contravention thereof, if it does not appear that the order of interdiction was made in open court, that the person interdicted was summoned before the court, and that proof was made to the court of his excessive drinking of liquor, and that the same resulted in a mis-spending, etc., of his estate, or great injury to his health, etc., in the terms of the statute.

. The order should not prohibit the *giving* but only the *sale* of liquor to the interdicted person.

. *Per* Boyd, C., and Ferguson, J.—A magistrate's order prohibiting the sale of liquor to an interdicted drunkard under the Ontario Liquor License Act constitutes a prohibition of any sale of liquor to such drunkard even though the same is delivered to and consumed by others and although no portion of the liquor was actually delivered to or consumed by the interdicted person.

. *Per* Robertson, J.—The sale of liquor upon the order of the interdicted person for delivery by the licensed liquor seller to other persons, present with the interdicted person, to be wholly consumed by such other persons on the licensed premises, and which is so consumed, does not constitute an offence under the Liquor License Act.

ARGUED : February 23, 1899.

DECIDED : March 1, 1899.

The defendant was convicted and fined \$20 by the police magistrate for the city of Chatham "for that he, the said Charles Mount on the 12th day of October, 1898, in the city of Chatham \* \* on his premises, being a place where liquor may be sold, unlawfully did sell liquor to John Henry, knowing that the sale of liquor to the said John Henry, a drunkard, was prohibited by an order in open Court made by Michael Houston, police magistrate, \* \* under the Liquor License Act."



The Ontario Liquor License Act, R. S. O. 1897, ch. 245, sec. 124, enacts that :—

(1) Where it is made to appear in open Court sitting in the county in which he resides, that any person, summoned before such Court, by excessive drinking of liquor, mis-spends, wastes or lessens his estate, or greatly injures his health, or endangers or interrupts the peace and happiness of his family, the police magistrate or justices holding such Court, shall, by writing under the hand of such police magistrate, or under the hands of two such justices, forbid any licensed person to sell to him any liquor for the space of one year, and such police magistrate, justices, or any other two justices, of the county in which the said person resides, may, at the same or any other time, in like manner, forbid the selling of any such liquor to the said person by any licensed person of any other city, town or district, to which he resorts or may be likely to resort for the same.

(2) Any person so prohibited or notified, his servants or agents, who violates the preceding sub-section, shall for a first offence be liable to a penalty not exceeding \$20, and for a second, and any subsequent offence, shall be liable to a penalty of not less than \$20 and not exceeding \$50.

(3) Wherever the sale of liquor to any such drunkard has been so prohibited, if any other person, with a knowledge of such prohibition, gives, sells, purchases or procures for or on behalf of such prohibited person, or for his or her use, any liquor, such other person shall, upon conviction, incur for every such offence, a penalty of not less than \$25 and not exceeding \$50.

The conviction having been removed into the High Court by certiorari, the document returned as the "order" upon which the conviction proceeded was a memorandum as follows :—

"I make an order forbidding any licensed person giving liquor to John Henry, in the county of Kent, for one year. M. Houston, Police Magistrate. Chatham, September 8, 1898."

A rule nisi to quash the conviction having been granted the present motion was made by the defendant to make the rule absolute.

TORONTO, February 23, 1899.

*Haverson*, for the defendant : No offence is disclosed by the information, the conviction, or the evidence. It does not appear that the order was made by a Court in the same county ; nor that Henry was summoned before that Court ; nor that he was guilty of excessive drinking. The conviction is bad on its face, and the evidence does not help it out.

*M. Wilson*, Q.C., for the complainant, referred to the Criminal Code, secs. 889, 890, 883 ; *Northcote v. Brunker* (1887), 14 Ont. App. 364 ; *Regina v. Coulson* (1893), 24 Ont. R. 246, 1 Can. Crim. Cas. 114 ; *Regina v. Coulson* (1896), 27 Ont. R. 59 ; *Regina v. Wallace* (1883), 4 Ont. R. 127 ; *Regina v. Walsh* (1897), 1 Can. Crim. Cas. 109 ; *Regina v. Hodgins* (1886), 12 Ont. R. 367 ; *Ward v. The State* (1885), 45 Ark. 351 ; *The State v. Munson* (1874), 25 Ohio, 381 ; *Regina v. Dias* (1898), 1 Can. Crim. Cas. 534 ; *Regina v. Bowman* (1898), 2 Can. Crim. Cas. 89.

*Haverson*, in reply, cited *Regina v. Elliott* (1886), 12 Ont. R. 524 ; *Regina v. Brady* (1886), 12 Ont. R. 358.

TORONTO, March 1, 1899.

BOYD, C.—

This is a conviction purporting to be under R. S. O. ch. 245, sec. 124. There is no evidence in the papers transmitted on the certiorari that any restrictive order or direction was made under and in pursuance of the method prescribed in the first sub-section. The statute requires (1) that it should be made to appear in open Court in the county wherein the person resides, (2) that he be summoned before the Court,

(3) that it appears by excessive drinking of liquor he mis-spends, wastes, or lessens his estate, etc. ; then the police magistrate may, by writing under his hand, forbid any licensed person to sell liquor to such person for the space of one year.

The writing produced in this case runs thus :—

“ I make an order forbidding any licensed person giving liquor to John Henry, in the county of Kent, for one year.

“(Signed) M. HOUSTON, P.M.

“Chatham, Sept. 8th, 1898.”

It does not appear where and in what circumstances this was made ; whether in open Court, whether after summons to the man, whether excessive use of liquor by him was proved or admitted, or not. The prohibition is in excess of the statute, which forbids *sale*—this order forbids *giving*. This special power—most beneficial when properly applied—must, nevertheless, be carefully exercised, after the fulfilment of all preceding conditions, and in the very terms of the statute—as it works interference with the man himself, and prohibition as to the licensees notified. The foundation of the whole proceeding to convict under the other sub-sections of the statute is gone if there is no valid preliminary order or direction in writing. There is then nothing to amend by, and the conviction as it stands is not in legal form, and calls for amendment, if it be possible.

My opinion is, that had there been a proper order forbidding the sale and that was served upon or the knowledge of it brought home to the defendant, the evidence here shews a violation of the law in making sale to the inebriate, though the liquor was given to and actually drunk by other persons on the licensed premises. I would have upheld the conviction as against this objection, but the other seems to be beyond remedy.

Quash without costs.

FERGUSON, J., concurred with Boyd, C.

ROBERTSON, J.—

I think the conviction must be quashed.

There is no proof of an order having been made under sec. 124 of the Liquor License Act. There is a memorandum or note written by the magistrate in these words :

“I make an order forbidding any licensed person giving liquor to John Henry, in the county of Kent, for one year.

“(Signed) M. HOUSTON, P.M.

“Chatham, Sept. 8th, 1898.”

There is no other evidence that any such order was made. This is a mere memorandum or note, such as would be made in the note book of the magistrate. The section requires the order to be in writing, under the hand of the magistrate, and, in a matter of so serious import as to interfere with the rights and liberties of the subject, and which makes other persons liable to a fine and imprisonment for infringement or disobedience of such order, all due form must be observed ; and although it is not required to be under seal, I think it should state the facts and circumstances, the reasons for summoning the person, and the evidence on which the order is made. There is, therefore, no foundation on which the conviction rests, and consequently the Liquor License Act has not been infringed upon, so far as appears.

Nor is there any evidence that the order, such as it is, came to the knowledge of the defendant before the act complained of was committed.

Then the conviction is for that he, the said Charles Mount, on the 12th October, 1898, in the city of Chatham, etc., in his premises, being a place where liquor may be sold, unlawfully did sell liquor to John Henry, knowing that the sale of liquor to the said John Henry, a drunkard, was prohibited by an order in open Court made by Michael Houston, P.M., for etc., under the Liquor License Act.

There is no evidence that the defendant knew that the sale of liquor to Henry had been prohibited, and although the

conviction is for unlawfully selling liquor to Henry, the magistrate finds that such liquor was not consumed by Henry, but by other persons, and he specially finds and returns in compliance with the writ of certiorari as follows :

"In this matter I find that as a fact John Henry ordered liquors at the hotel of the defendant, Charles Mount ; that the liquors were delivered upon his order and drunk in his presence by a number of persons ; but that the liquors were not actually delivered to said John Henry, and no part of such liquors were drunk by him."

"I find that the said John Henry paid for said liquors delivered to those parties in his presence and drunk by them, and upon the above finding I find that the defendant sold the liquor to Henry which was ordered by him, although delivered to the other parties and consumed entirely by them, and that it comes within the Act, and I find the defendant guilty accordingly."

The 124th section of the Act, in my judgment, means the selling of liquor to the person named in the order for his own personal consumption, not for the consumption of other persons, against whom no such order is directed. A person against whom any such order is made, may have completely reformed and may have ceased to be a person of excessive drinking habits within the meaning of the section, long previous to the expiration of the time prohibited by the order, and may not in any sense be a drunkard, and to say that the Act means, notwithstanding all that, that such person shall not in any sense offer to a friend a glass of liquor, although the order is still in force, is, in my opinion, not what the Legislature meant when it gave its sanction to the Act. A man may mis-spend or lessen his estate, etc., as he pleases, so long as in so doing he is not doing it by excessive drinking, contrary to the Liquor License Act, or by committing a crime. In my judgment, the Act contemplates the personal consumption of the liquor by the person who is named in the order, and so long as that is not the fact, no licensed person, or other person, can be made responsible by selling liquor to such person not to be consumed by himself.

Before an order under the 124th section of the Act is made, must be established, to the satisfaction of the magistrate before whom the person is summoned, that such person, by excessive drinking of liquor, mis-spends, etc., not that he is mis-spending, etc., in any other way ; and such order when made must be proven to have come to the knowledge of the licensed person who is charged with selling, etc.

The words of the Act are, that the order is to " forbid any licensed person to sell to him (the drunkard) any liquor for the space of one year," etc. It would not meet the case of another person treating, as it is called, the person named in the order ; so that the selling of liquor to another person, to be consumed by the person named in the order, is not covered by the Act.

These are my personal views of the purport and meaning of the section in question.

*Conviction quashed.*

[COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE KILLAM, C.J., DUBUC AND BAIN, JJ.

### THE QUEEN v. WINSLOW.

*Dealing from the person—'Pocket picking'—Material ingredients of offence to be proved—Appeal pursuant to leave—Cr. Code 744, 746.*

Where in a charge of pocket picking the evidence in the opinion of a Court of Appeal goes no further than to support a reasonable surmise or suspicion that the accused was guilty of the offence and lacks the material ingredients necessary to establish guilt, the conviction will be quashed upon an appeal under Cr. Code secs. 744 and 746.

ARGUED : December 6, 1899.  
DECIDED : December 13, 1899.

The prisoner was tried under the Speedy Trials sections of the Criminal Code before Richards, J., without a jury, and convicted of having stolen a pocket-book or purse containing

\$3.50 in money and a railway ticket from the person of a Mrs. Douglas.

Counsel for prisoner requested the trial Judge to reserve a case for the opinion of the Full Court upon the question whether there was sufficient evidence to have warranted the leaving of the case to a jury, if a jury had been sitting. This being refused, the prisoner, with the consent of the Attorney-General, applied for and obtained leave to appeal under section 744 of The Criminal Code.

The trial Judge then stated a case setting out the evidence given at the trial in full, and submitting the above question for the opinion of the Full Court. The prisoner also moved for a new trial on the ground that the verdict was against the weight of evidence.

*R. A. Bonnar* for the prisoner cited *Reg. v. Theriault*, 2 Can. Cr. Cas. 444, and *Reg. v. Harris*, 2 Can. Cr. Cas. 75.

*George Patterson* for the Crown.

WINNIPEG, December 13, 1899.

KILLAM, C.J.—

With all respect for the opinion of the learned Judge, it appears to me that the evidence did not raise more than a mere suspicion against the prisoner, and was not sufficient, in law, to warrant a conviction.

At most the evidence seems to shew that Mrs. Douglas entered the grounds of the Winnipeg Industrial Exhibition with a large number of people, and having in her pocket a purse containing the money and ticket mentioned; that she stopped in a crowd to watch something that attracted attention; that there was a commotion in the crowd during which the prisoner pushed her or was pushed against her; that just as this occurred a police constable saw the prisoner putting his hand in a fold of her dress which he took to be the situation of her pocket; that the purse was then missed, and that the prisoner, being arrested after an interval, had

upon him money in notes and silver, some of which were of the denominations of the money in Mrs. Douglas' purse, but none of which could be identified as having been hers. In my opinion, upon such evidence, a jury should have been directed to acquit the prisoner.

Other questions have been raised as to the sufficiency of the identification of Mrs. Douglas by the constable and of the prisoner by both of them, and as to the identity of the occurrences testified to by these witnesses. While it is possible that the case might properly have been submitted to a jury upon these points, even here it was exceedingly weak.

I deem it unnecessary to consider the motion for a new trial; but upon the case reserved, I would quash the conviction.

DUBUC, J.—

The principal point to be considered is whether, upon the whole evidence, there was sufficient evidence to have left the case to a jury had a jury been sitting on the case.

It is, of course, an unquestionable axiom based on law, justice and common sense, that no man should be convicted, unless the offence with which he is charged is clearly proven. The proof in this case consists of disjointed pieces of circumstantial evidence of a rather unsatisfactory character. The only fact indisputably established is that the complainant, Mrs. Douglas, lost her pocket-book containing the sum of \$3.50. She had it at the gate of the exhibition grounds and, a short time afterwards, she missed it. She does not positively know whether it was in her dress pocket or in her hand when it was missed. Did she drop it in the hustle of the crowd, or was it taken away from her, is a question she is not clear about. She is also in doubt as to the exact moment when it was gone. At a certain spot, she found herself in the middle of a crowd, and a good deal of pushing ensued. She says a man rubbed against her, and then she discovered that her pocket-book was gone. She called out that she had been robbed; a constable came; she pointed out a man as being the one who had rubbed against her and who



she supposed was the thief. The constable went to arrest the individual pointed out, and when she saw him she said he was not the man.

Detective McKenzie was a short distance from the crowd where the pushing took place, and he says he saw a man, whom he recognizes as the accused, put his hand into a woman's dress pocket. But he cannot swear that Mrs. Douglas is the woman. On the other hand, Mrs. Douglas cannot swear that the accused is the man who rubbed against her and who is supposed to have taken her pocket-book. At the police station, the accused was searched and small sums of money were found in different pockets of his clothes. Mrs. Douglas says there was in her pocket-book a \$2 bill, a \$1 bill and a 50c. silver piece. In one of prisoner's vest pockets was found a \$2 bill and a \$1 bill, but no silver and no pocket-book. Mrs. Douglas cannot identify those bills as hers because, as she says, she had not marked them.

The above is, in substance, the evidence given in support of the charge. Was it sufficient to have left the case to a jury had a jury been sitting on the case? I find it to be a very delicate and difficult question. There may be, of course, a reasonable surmise that the accused was the man who rubbed against Mrs. Douglas, and that Mrs. Douglas was the woman in whose pocket the accused put his hand. There may be also a surmise that the pocket-book was, at the time, in Mrs. Douglas' pocket, and that the accused, if he found it there, took it out. There is, again, the surmise that the two bills of \$2 and \$1 respectively, found in the pocket of the accused, might be the two bills lost by Mrs. Douglas; but these are only surmises; and, by the rules of evidence obtaining in our courts of justice, accused parties are not to be convicted on surmises; even in charges supported by circumstantial evidence, the proof must be such as to leave no reasonable doubt in the mind of the jury. It is the province of the jury to weigh the evidence, and pronounce upon it whether the offence is proved or not. But, according to the well-established rule and constant practice of courts of criminal jurisdiction, it is for the judge to decide whether there is

sufficient evidence in support of the charge to be submitted to them.

In this case, as there is no positive identification of Mrs. Douglas by McKenzie, no real identification of the accused by Mrs. Douglas, no identification of the money found on the accused, no certainty that the pocket-book was in Mrs. Douglas' pocket, nothing to shew that the accused took anything out of the pocket into which he put his hand, it seems to me that the material ingredients to establish the guilt of the accused were wanting, and that, therefore, there was not sufficient evidence to have left the case to a jury had a jury been sitting on the case.

In my opinion, under sub-section *d* of section 746 of the Criminal Code, it should be held that the accused ought to have been acquitted and an order made for his discharge.

BAIN, J., concurred.

*Conviction quashed.*

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., AND WEATHERBE, TOWNSHEND,  
MEAGHER AND HENRY, JJ.

## THE QUEEN v. DIXON (No. 2.)

*Threatening with intent to extort—Proof of threatening letter  
—Evidence of handwriting—Comparison by jury with  
admitted handwriting—Improper reception of document—  
Error cured by subsequent evidence—Cr. Code 406, 746(f).*

1. Where, in a charge of sending a threatening letter to a person with intent to extort money, it is proved that the accused had stated that he had written a letter to such person, and that he had stated its purport in language to the like effect as the threatening letter, it is not error for the court to admit the threatening letter in evidence without further proof of the handwriting, and to submit to the jury for comparison with an exhibit, already in evidence, admittedly written by the accused.
2. A jury may properly make a comparison of doubtful or disputed handwriting, and draw their own conclusion as to its authenticity, if the admittedly genuine handwriting and the disputed handwriting are both in evidence for some purpose in the case, although no witness was called to prove the handwriting to be the same in both.
3. An error in receiving in evidence a document insufficiently proved may be cured by the subsequent evidence in the case; and it is not necessary to again tender the document after the evidence necessary to complete its proof has been disclosed.

ARGUED : November 11, 1896.

DECIDED : January 23, 1897.

The defendant was indicted, tried and convicted for unlawfully threatening to accuse one, Malcolm McDonald, of having committed an offence against the Nova Scotia Liquor License Act, with intent to extort money. The alleged threat was contained in the following letter :—

(Exhibit M/2.)

HALIFAX, Aug. 21st.

MR. McDONALD :

Dear Sir,—I wish to draw to your notice that it is in my power to get you fined for selling liquor after hours, as I have a flask of “rum” in the house which I asked my wife’s

brother to get on Saturday night last, and I was with him at the time, and he told me he had no trouble, as you invited him in, and he got it all right at 8.35 by my watch. Now, if you like to settle the account between us it will be all right. Send me a receipt for the amount by the morning, and all is well ; otherwise, you know what to expect.

R. S. DIXON,  
No. 10 Maynard St., City.

Subsequently to the writing of the above letter, the accused sent the following to the Inspector of Licenses for the City of Halifax :—

(Exhibit M/3.)

HALIFAX, Aug. 26th, 1895.

H. H. BANKS, Esq.

Dear Sir,—I wish to bring to your notice that I have a flask of rum in the house which was got at M. McDonald's, corner Gottingen and Gerrish Streets, on the 17th, about 8.45 p.m. I was with the man when he got it, and took out my watch at the time, and the person wishes to have the case brought up.

P.S.—I was over to see you at your office, but could not wait. Yours, &c.,

R. S. DIXON,  
c/o Simson Bros. & Co., City.

HALIFAX, November 11, 1896.

C. S. Harrington, Q.C., moved to set the conviction aside : There is no evidence of M/2 sufficient to warrant its being submitted to the jury. Warrants not in evidence cannot be received and submitted to the jury without the interposition of witnesses. Taschereau's Crim. Code, p. 805. MEAGHER, J.—Is there not a difference between a document being in evidence for the purpose of weighing against a party and being in evidence for the purpose of comparison?] *Cobbett v. Kilminster*, 4 F. & F., 490. There can be no comparison by the jury until there is some evidence that both letters were written by the same party. Verbal admission of

a document does not make proof of a document ; *The Queen v. Silverlock* (1894), 2 Q.B. 766.

*J. W. Longley, Q.C.*, Attorney-General, contra : There is evidence that M/2 was produced in court on the trial of *The Queen v. McDonald*, by Mr. Wallace, who was acting for McDonald, when cross-examining Dixon. We proved that McDonald received this letter through the mail, addressed to him. A few days afterwards M/3 was received by Banks. Banks then saw Dixon, before prosecuting. Dixon told him that he had written M/3. M/3 was then in evidence. Dixon was arrested for writing M/2, when Banks had a conversation with him, in which Dixon said he was arrested for writing a letter in which he said that unless McDonald would square up a judgment which McDonald had against him he would inform against him for selling liquor without license, and that he was sorry he had done it. When Dixon's wife was called in this case, she said that Dixon said to Banks, Don't you remember that letter Wallace had in his hand when he was cross-examining me on the trial of McDonald? [WEATHERBE, J.—There is nothing in that to identify the letter which Mr. Wallace had with M/2 or with the letter of which Dixon was speaking.]

*C. S. Harrington, Q.C.*, in reply : The attempted identification of the document must fail. It is not the case of an admission that this was the writing of the defendant, and unless it is brought within that category the Crown must fail. [WEATHERBE, J.—We are all agreed that you cannot hand the paper to the jury for the purpose of comparison with one already in evidence. MEAGHER, J.—I cannot agree with that statement. I think that rule has certain limitations.] Unless the first paper was in evidence by some proper kind of proof, it was wrong to ask the jury to compare it with the other writing. There was no such evidence here. In a criminal matter the court cannot draw inferences. [WEATHERBE, J.—After the paper was admitted, there was evidence from which the jury could infer an admission as to this letter. Now, did not the judge leave it to the jury to draw that inference?]

f the letter was not in without comparison, it was not in at all. If there is evidence in upon which a conviction might have been obtained, but certain evidence has been wrongly admitted, then the verdict is bad. A document can only be identified by being presented to a witness; *Makin v. Attorney-General* (1894) A.C. 69; Criminal Code, sec. 746.

HALIFAX, January 23, 1897.

TOWNSEND, J.—

The question is whether the learned judge rightly allowed evidence, and to be placed before the jury, the threatening letter, the subject of the prosecution. Havelock Banks produced the letter M/3, which the accused acknowledged he had written to him, giving information of violation of the Liquor License Act by McDonald, the prosecutor. It was proved that the threatening letter in question had been delivered by the postman at McDonald's house, and was subsequently received by him. It was further proved that the accused was examined as a witness in a prosecution against McDonald for the alleged violation of the Liquor License Act, and, in the course of examination, he was interrogated about this letter M/2, but the learned judge properly refused to receive what he said. It was further proved that the accused, when in custody on this charge, spoke of a letter he had written to the prosecutor, McDonald, and said he was sorry he had done it; he didn't think there was any harm in it; and that he also said he had written McDonald that, if he would square up some matter between them, then all would be well, otherwise he would inform against him for illegally selling liquor. Sarah Dixon, his wife, further stated the following conversation at same interview:

"Accused said Malcolm McDonald had him arrested, accusing him of sending a threatening letter, and Banks said, 'What letter?' Accused replied, 'Don't you remember the letter Mr. Wallace showed in court?' Banks said: 'Yes, I remember that letter Wallace had in court.' Banks

said : ' I didn't think they were going to do anything like that to you.' Dixon replied, and said he was sorry he had anything to do or say with McDonald at all. Banks replied, if he knew the liquor dealer as well as he (Banks) did, he wouldn't. That was all the conversation then. Banks then went away. Accused detained in the station all night. I didn't hear my husband say he was sorry he had written that letter. I could hear all that was said."

It was also admitted by the accused that he had written M/3 to Banks. Both letters were received in evidence, and the jury, it is said, were allowed to draw inferences, by comparison of handwriting, as to whether accused had written M/2, the incriminating letter. The prisoner's counsel contends that the learned judge was wrong, without a witness being first called to prove the handwriting to be the same in both; in other words, that the jury, without evidence, could not take the letter, proved to be genuine, and make the comparison themselves.

Section 698 of the Criminal Code provides :

" Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

Taylor, sec. 1870, commenting on this provision, says :

" Under this statutory law it seems clear, first, that any writings, the genuineness of which is proved to the satisfaction, not of the jury, but of the judge, may be used for the purposes of comparison, although they may not be admissible in evidence for any other purpose in the cause, and, next, that the comparison may be made either by witnesses acquainted with the handwriting, or by witnesses skilled in deciphering handwriting, or without the intervention of any witnesses at all, by the jury themselves, or, in the event of there being no jury, by the court."



This statement of the effect of the decisions will be found to be upheld on reference to the cases cited in its support : *Bird v. Ridgely*, 1 F. & F. 270 ; *Creswell v. Jackson*, 2 F. & F. 24 ; *Colbert v. Kilminster*, 4 F. & F. 490.

The learned judge, therefore, was quite justified, when he charged the jury, after all the evidence was in, in allowing the jury to compare the admitted writing with that which was disputed, in order to draw their own conclusion from a comparison of the two.

There was, however, sufficient evidence, independently of this, to enable the jury to convict. Here we have the clearest evidence of the prisoner's own admission that he had written a threatening letter to the prosecutor ; and, following that, the prisoner, in his interview with Banks, identified this particular letter, M/2—the one Mr. Wallace showed in court—as the one he had written ; and, to place beyond doubt the identification, Monaghan, the clerk, swears that the prisoner was examined by Mr. Wallace on that occasion about M/2. This was ample testimony to go to the jury to prove the perpetration of the offence by the prisoner. The letter now proved to have been written by him is traced by legitimate evidence into the hands of the prosecutor. These facts, coupled with the other evidence that the threat therein contained was actually carried out, form, in my opinion, a complete chain, which, apart from anything else, was not only sufficient to convict, but precluded any other verdict. I think the conviction was good.

In the foregoing remarks I have not referred to the principal ground on which Mr. Justice Henry bases his decision. I have not done so, as the point was not taken at the argument by the learned counsel for the defence, and, in writing my opinion, I had not considered it. After a careful perusal of my learned brother's decision, I am unable to concur in the view he has expressed. I refrain from dealing with the reasons, and authorities in support, as I understand Mr. Justice Meagher has reviewed them very fully in his decision.



MEAGHER, J.—

It may, perhaps, be that I was wrong in receiving the letter, on which the prosecution rested, at the close of the case for the Crown. I did, however, as a matter of fact, receive it. It was, therefore, rightly or wrongly, before the court, and in evidence.

I thought at the trial, and I still remain of the same opinion, that all that is necessary to entitle the jury to make a comparison of doubtful or disputed handwriting, is that the genuine, and the doubtful or disputed handwriting must be in evidence for some purpose in the cause. All those conditions were complied with in the present case. The rule is thus stated in Roscoe's Criminal Evidence (11th edition), p. 5 :

“In criminal cases, the jury may form their opinion as to the genuineness of a document by a comparison of it with any other documents already in evidence before them, and shown to be the genuine production of the person whose handwriting is in question.”

*Solita v. Yarrow*, 1 Moo. & Rob. 133, was an action of assumpsit by the indorsee against the drawer and indorser of a bill of exchange with a count for goods sold and delivered. The bill of exchange was admitted. The plaintiff put in a letter purporting to be written by the defendant, dated a few days before the bill of exchange became due, ordering plaintiff, who was a tailor, to send three yards of cloth to a Mr. Lindor, for him, the defendant. The cloth was sent, but it was denied that the order was written by him. Witnesses were called both ways as to handwriting of order. Platt, for the plaintiff, relied strongly on the comparison of the disputed writing with the admitted writing in the bill. Lord Tenterden, C.J., in summing up, made similar remarks, and desired the jury to take the papers and compare them. The following note is appended to the report of the above case :

“The same course was adopted in *Griffith v. Williams*, 1 C. & J. 47, and recognized by the Court of Exchequer,

Bolland, B. especially grounding his judgment on such a comparison. The rule, however, only authorizes the comparison of writing with documents which are put in evidence for other purposes. In *Rex v. Morgan*, Glamorganshire Lent Assizes, 1831, an indictment against the prisoner for sending a threatening letter, there being no proof that he sent it, except from its being supposed to be in his handwriting; and the evidence of handwriting being very slight, it was proposed, on the part of the prosecution, to put in a document undoubtedly written by the prisoner, but unconnected with the charge in the indictment, that the jury might inspect it and compare it with the letter in question, and it was contended on *Griffith v. Williams* that the evidence was inadmissible; that if the comparison be admissible in itself, it must be allowable to put papers in evidence for the purpose of enabling the jury to make it.

"Bolland, B., on the authority of the case cited, was at first inclined to allow the evidence to be given, but afterwards said, on further recollection of the case of *Griffith v. Williams*, he thought it was not the intention of the court in that case, and certainly not his own, to decide anything more than that the jury were at liberty to compare the disputed hand-writing with that of documents which were in evidence in the case independently of that question. To say that a party may select and put in evidence particular letters bearing a certain degree of resemblance, or dissimilarity, to the writing in question, is a different thing from allowing the jury to form a conclusion from inspecting a document put in for another purpose, and, therefore, free from the suspicion of having been so selected. The learned judge therefore rejected the evidence."

The note refers to a section of Philips on Evidence, opposed, to some extent, to the foregoing ruling, and the editor adds: "This position, according to the above cases, would be now considered too general."

*Griffith v. Williams*, (1830) 1 C. & J., 47, decided that the rule that comparison of hand-writing is not evidence does not extend so far as to prevent the court or jury from

instituting a comparison between two documents of which prima facie evidence has been given."

In that case, as well as in *Solita v. Yarrow*, 1 Moo. & Rob. 133, it is true, there was some evidence of the hand-writing, and the trial judge desired the jury to make a comparison between the admitted and disputed letters. The court said :—

"Where two documents are in evidence, it is competent for the court or jury to compare them. The rule as to the comparison of hand-writing applies to witnesses who can only compare a writing to which they are examined, with the character of the hand-writing impressed upon their own minds, but that rule does not apply to the court or jury who may compare the two documents when they are properly in evidence."

The next case to which I shall refer is *Doe d. Devine v. Wilson, et al*, 10 Moo. P.C.C., 502, where the Judicial Committee held the "hand-writing of a deceased witness, made at the time of his examination by a commissioner, but not returned with the deposition, is sufficiently in evidence for the purpose of comparison with his signature to a deed, the genuineness of which is impeached."

In that case the signature of a witness named Maher was not, strictly speaking, in itself evidence, and was not tendered in evidence, yet it was submitted to the jury for comparison with his signature to a deed, to determine if the latter was genuine. Sir John Patteson, in giving judgment, said :—

"The signatures of Maher stand on a different ground. They may, in some sort, be said to have been in evidence in the cause. Their lordships have no doubt that if, on a trial in nisi prius, a witness had denied his signature to a document produced in evidence, and, upon being desired to write his name, had done so in open court, such writing ought to be treated as evidence in the cause, and be submitted to the jury, who might compare it with the alleged signature to the document. The three signatures of Maher in question were made by him when he was properly under examination as a

ness in this cause, and although not returned by the  
cer who took that examination, yet they were identified,  
their lordships are of opinion that they may fairly be  
ted as evidence in the cause, that they were admissible,  
were properly submitted to the jury."

The above was an appeal from New South Wales. The  
ute admitting comparison of hand-writing by witnesses  
not been enacted there at that time. See also *Richard-*  
*v. Newcombe*, 21 Pick., 315; *Commonwealth v. Coe*, 115  
ss., 481; and *Moore v. United States*, 91 U.S., 270.

Prior to the introduction in England of the Act which  
mitted witnesses to make comparison of a disputed  
iting with any writing proved to the satisfaction of the  
dge to be genuine, the court and jury might compare  
ritings, once they were admitted for the general purposes  
the cause, but witnesses were only permitted to compare  
em with the character of hand-writing impressed on their  
wn minds, but not with other writings of the party in  
vidence or otherwise. The statute just referred to changed  
at, and enabled witnesses to give evidence by comparison  
f a disputed writing with any writing, whether in evidence  
r not, and whether relevant or not, proved to be genuine to  
e satisfaction of the judge. But it did not in any manner  
o away with or affect the rule which previously permitted  
ocuments in evidence to be shown to the jury for the pur-  
oses of comparison. I do not, therefore, see that that  
nactment affects the question now before us. If it has any  
earing it is in favor of the course adopted upon the trial.

The facts of this case are, briefly, that on a certain day of  
e week and month, and at a certain hour of the evening,  
e accused and his brother-in-law called at the store of the  
rosecutor, and while there one of them purchased some  
quor from the prosecutor, who held a license. The purchase  
as made after the hour for closing under the Liquor License  
ct of 1886. Within a very short time afterwards a letter,  
e threatening letter in question, was received by the prose-  
utor through the mail, purporting to be signed by the

accused, and written at the house where he lived, No. 10 Maynard Street. It referred to the fact of the purchase and the violation of the law consequent thereon, made at the day and hour at which the purchase was, in fact, made, and threatened the prosecutor with a prosecution for such offence unless he gave up a claim he had against the accused upon an account he had against him, and which, it was proved, was then the subject of proceedings before a commissioner under the Act relating to the collection of debts. This letter was promptly followed by a letter to Banks, the License Inspector, admittedly written by the accused, in which the facts and circumstances attendant upon the purchase of liquor were repeated, in terms almost identical with those used in the letter received by the prosecutor and purporting to be signed by the accused. I append both letters to this opinion.

The Inspector took proceedings for the penalty against the prosecutor accordingly, and upon that trial the accused gave evidence relating to the offence, which was charged to have been that which was detailed in the threatening letter and in the letter to the Inspector. The prosecutor was convicted.

After the accused was arrested upon this charge he had an interview with Banks, in which, according to Banks' testimony, the following conversation took place :

"Had a conversation with the accused after he was arrested upon this charge, in the police station ; he was then under arrest . . . We talked about his arrest at the instance of the prosecutor, McDonald. The accused spoke of a letter he had written to the prosecutor, and said he was sorry he had done it ; he didn't think there was any harm in it. He also said he had written McDonald that if he would square up some matter between them all would be well, otherwise he would inform against him. I understood that to mean for illegally selling liquor."

The foregoing not only proved that he had written a threatening letter to McDonald, but it discloses the substance of it, in terms corresponding with the letter itself. At the

time of that interview he knew what he was charged with, and therefore his admissions are all the stronger. Monaghan, the clerk who took the evidence upon the trial of the prosecutor for the violation of the Liquor License Act, testified that, upon the prosecution of McDonald for the illegal sale of liquor on Dixon's information to Banks :—

“ The accused was examined as a witness for the prosecution upon that trial, and gave evidence. I took it and he signed it. He was examined about M/2 (the letter he wrote to McDonald) on that occasion by Mr. W. B. Wallace, the counsel for McDonald the present prosecutor. Mr. Wallace handed the accused M/2 and examined him upon it.”

Upon that evidence I received the letter in question, being of opinion that a *prima facie* case—a slight one it may be—had been made out for its reception. Bank's evidence created probability that he was the author of it. The weight to be given by the jury to that evidence was another matter altogether. The evidence at that stage showed :

(a) That the prosecutor, at the time the letter was received by him, was pressing legal proceedings against Dixon for the recovery of the debt Dixon owed him.

(b) That the accused and his brother-in-law, or the latter at the instance of the former, procured the prosecutor to commit the violation of the liquor law, for which, at Dixon's instance, he was prosecuted by Banks and convicted.

(c) Dixon took an active part in securing the conviction, and was the principal actor in all the steps taken to bring about that result.

(d) He admitted having written a letter to the prosecutor in which he threatened to accuse him of the offence which he subsequently reported to Banks, and his conduct prior to the arrest showed that he carried out the threat which the letter conveyed to McDonald.

(e) He admitted having written such letter, after he was arrested upon a charge of having written it, and expressed his regret at having done it, and said he didn't know it was any harm ; a regret obviously produced by the fact that he

was in trouble as the outcome of his conduct towards McDonald, and

(f) The prosecutor proved the receipt of a letter through the mails purporting to be written by and coming from the accused, and containing statements of fact known only to himself and his brother-in-law.

If it be said that his statements did not go far enough to show the offence, I reply that that was a question for the jury, who were at liberty to draw inferences of fact from all the surrounding circumstances. I had no reason to doubt the correctness of Banks' testimony, and, therefore, I thought that it was pretty clear that the accused had, in effect, admitted to Banks having sent that letter, or one in the same terms. If there were two it was for him to explain.

I received the letter in that view. The use of the word "inform" in a conversation with the License Inspector, whose duty it was to file and prosecute informations for sale of liquor, is suggestive.

The accused entered upon the defence and called his wife, and the brother-in-law who had accompanied him to the prosecutor's premises at the time they, or one of them, induced the prosecutor to violate the Liquor License Act. The wife was present at the conversation between Banks and her husband, and her evidence touching it was in substance as follows :

"Banks said to him, 'what are you doing here?' Accused replied Malcolm McDonald had him arrested, accusing him of sending him a threatening letter, and Banks said, 'what letter?' Accused replied, 'Don't you remember the letter Mr. Wallace showed in court?' Banks said, 'Yes, I remember that letter Wallace had in court. I didn't think they were going to do anything like that to you.' Dixon replied he was sorry he had anything to do or say with McDonald at all."

Monaghan, it will be seen, had already proved that, upon the trial of the charge against the prosecutor, his counsel had cross-examined the accused with respect to the threatening letter. Her evidence, therefore, clearly identified that



letter as the one to which the accused referred in the conversation with Banks.

Assuming that I erred in receiving the letter when I did, viz., after Banks' and Monaghan's evidence had been given, the evidence of the accused's wife clearly identified it, and connected defendant with it, and justified its submission to the jury. Any link which may have been wanting was supplied by her testimony, coupled with that of Monaghan. If she had been called on the part of the prosecution, after Monaghan, and gave the same testimony she did, it cannot reasonably be doubted that it would have been proper to have received the letter in question. The letter was clearly relevant; it was identified and was in evidence, and therefore came within the rule laid down by the authorities to which I have referred, and many others which I need not quote. That was the condition of things when I began my charge to the jury, and I am utterly at a loss to discover any ground whatever for saying that the jury were not at liberty to compare it with the admittedly genuine letter of the defendant, which was also in evidence. No objection was raised that the letter should have been tendered again. It was discussed before the jury as if in evidence. I do not admit I was wrong in receiving it when I did. The jury were not obliged to give effect to it; perhaps they could not do so without believing that it was the letter referred to by the accused during the interview with Banks. The case was submitted to them in that aspect. All the circumstances, apart from the conversations or admissions referred to, pointed to one conclusion alone, viz., that he was the author of it and had sent it. I doubt very much whether the jury need have regarded the letter at all, because the admissions in question, if they believed the evidence, showed that he was guilty of the crime charged. The contents or substance of the letter were admitted, and formal proof or production of the letter was not, I am inclined to think, necessary.

If the position taken by my learned brother, Henry, is sound, it follows as a necessary result that I should have



directed an acquittal at the close of the case for the Crown, and that I erred in not doing so. That appears to me to be the logical outcome of his conclusions.

The English authorities clearly show that it is purely discretionary with the judge whether he directs an acquittal at the close of the plaintiff's case or not. Lord Denman, in *Sowell v. Champion*, 6 A. & E., 415, said :—

“ At the close of this case counsel for T. & W. applied to the learned judge to direct their acquittal, which, we think, he properly refused. The ground for the application was the alleged absence of evidence against them to make them trespassers, but this ground, if true, in fact, would by itself have been insufficient to warrant it. The application to a judge, in the course of a cause, to direct a verdict for one or more of several defendants in trespass, is strictly to his discretion ; and that discretion is to be regulated, not merely by the fact that at the close of the plaintiff's case no evidence appears to affect them, but by the probability whether any such will arise before the whole evidence in the case closes. There is so palpable a failure of justice when the evidence for the defence discloses a case against a defendant prematurely acquitted, that such acquittal ought never to take place but where there is the strongest reason to believe that such a consequence cannot follow. In the present case, we think that if, in truth, there had been nothing for the jury to consider as against these two defendants, the judge would have exercised a sound discretion in refusing to direct their acquittal when application was made.”

This was recognized and followed in *White v. Hill*, 6 Q. B., 487, in the course of the argument in which Lord Denman, C.J., said, in answer to the same contention :—

“ In *Sowell v. Champion* we held that this was discretionary with the judge ; and the more usual practice certainly is to let the whole case go on.”

*Allen v. Cary*, 7 E. & B., 463, is much in point. It was an action on a promissory note, and the only issue was a plea of set-off. The defendant's counsel began, and, at the close

of the case for the defendant, the plaintiff's counsel contended that there was no evidence of the set-off, and claimed a verdict. The judge refused to direct a verdict for the plaintiff, but gave plaintiff leave to move to enter one. The plaintiff then called evidence, and on the evidence which followed the set-off was proved. The jury found for the defendant. The plaintiff, pursuant to the leave reserved upon the trial, moved to enter a verdict for the plaintiff, on the ground that the case ought to have stopped at the close of the original case for the defendant. Lord Campbell, C.J., on a later day in the term, said that, as the plaintiff's counsel had elected to continue the case, after the leave reserved, he was not entitled to object to the subsequent evidence having been taken into consideration.

In *Faund v. Wallace*, 35 L. T. N. S., 361, Lush, J., said :

"I quite agree with the observations made by my brother Blackburn. Even assuming that evidence is prematurely admitted which afterwards became admissible in the course of the trial, that is no ground for a new trial."

Bliss, J., in *Regina v. Kennedy*, 3 N.S.R., 210, in applying the principle of those cases, said :—

"I am not aware that any positive rule on this subject has been laid down with respect to criminal trials, but an analogy doubtless exists between these and civil cases on this point, and the rule in the latter may be considered to apply in all trials . . . Now, if it be discretionary with the judge in a case of trespass to direct an acquittal or not in this stage of the cause, and that discretion is to be exercised with great caution, *a fortiori*, will this apply to criminal trials. . . . And the very circumstance of an indictment by the grand jury, which should only be found upon at least a *prima facie* case of guilt against all, distinguishes the case somewhat from a civil action, and seems to call for a more guarded discretion on the part of the judge, lest an accomplice in crime escape through an unfortunate and premature acquittal. Even where there is no direct evidence to affect one particular party, there may be much to excite suspicion and lead the judge to think that all, perhaps, has not yet been disclosed ;

that something still lurks behind, and may well induce him, if not wholly to refuse, yet to delay the acquittal till the last, that the criminal justice of the country may not be defeated."

Wilkins, J., in the same case, admitted that he could find no authority for the position that if there was no evidence at the close of the whole case the judge might then have been bound to direct an acquittal. Apparently, he thought no such rule existed, but that it was only deducible from what the analogy of the practice in civil cases might be supposed to afford.

Strong reasons were present to my mind, in this case, urging me, so far as it was in my power, to bring about a full enquiry "and to prevent anything that might have been lurking behind" from being kept concealed. It had been stated in court, when the grand jury enquired why the indictment which they had found at a previous term had not been tried, that the parties had arranged it amongst themselves; besides that, delay in proceeding with the trial at the term in which it was tried had been experienced by reason of the difficulty in procuring the attendance of the prosecutor to give evidence. In addition to this, I entertained, at the close of the case for the Crown, very strong suspicions that the defendant was probably guilty. These and other reasons induced me to feel that it was in every way desirable that there should be a full and complete enquiry, and, if there was anything "lurking behind," that it should be brought out. I thought then, and the result proved that I was right, that it was very probable further material evidence one way or the other would be given if the defence was entered upon. The result was to complete the chain of evidence establishing defendant's guilt.

It is now claimed, though the point was not taken at the trial, and was not argued upon the appeal, that I erred in receiving the letter when I did, and that the lack of evidence to justify its reception at that time could not be supplied by evidence given at any subsequent stage of the trial. This is

—to me, at least—a theory entirely novel, and in my judgment it is altogether inappropriate in the administration of justice that such a rule should exist. I have always understood the rule to be that it is enough if the competency of the evidence is established before the case is given to the jury. If a document is received in evidence it is before the court once for all, and may, if relevant, be used for all purposes to which it is applicable in relation to the issues being tried in the cause. A judge often receives documentary evidence upon slight proof—sometimes upon insufficient proof—but I should be surprised to find a case which determined that evidence subsequently given in the cause, which removed all doubt of its admissibility and supplied the needed proof, should not be regarded, and that, in order to bring it properly before the court, it is necessary to tender it again in evidence. I am dealing with a case where the document has actually been received, as it was in this case.

The Attorney-General, when he tendered the incriminating letter, contended that it was receivable upon the proof then before the court. So far as I am aware, he never receded from that position. With respect to the alleged rule to which I have just referred, I am not aware of any distinction between civil and criminal cases.

In Russell on Crimes, vol. 3, p. 212, edition of 1877, it is said :—

“There is no difference, as to the rules of evidence, between civil and criminal cases ; what may be received in one case may be received in the other, and what is rejected in the one ought to be rejected in the other. A fact must be established by the same evidence, whether it is to be followed by a civil or criminal consequence.”

See also vol. 4 Am. and Eng. Ency. of Law, 842, and *Reg. v. Watson*, 2 Stark. 155 ; *Reg. v. Murphy*, 3 C. & P., 306 ; Greenleaf, notes to sec. 62, and *Regina v. Atkinson*, 17 U.C.C.P., 304.

Harris on Criminal Law, p. 427, enumerates the chief points of difference, such as number of witnesses in perjury,

treason, in relation to confessions, evidence of character, etc., between the rules of evidence in civil and criminal cases, but does not refer to any such distinction as that sought to be applied here. Stephen, in his *History of the Criminal Law*, treats the matter substantially in the same way.

There is no rule of law, so far as I am aware, which obliges a judge, at the close of the prosecution in a criminal case, or at the close of the plaintiff's case in a civil suit, to decide the case one way or the other. I do not believe any modern authority can be found opposed to those I have already given, nor any to the effect that his refusal to stop the case at that stage, however erroneous such refusal may have been, may be relied upon as a ground for setting aside a verdict or conviction, where the evidence given at a subsequent stage supplied what may have been wanting to make out a case at the time of such refusal.

If such a principle prevailed the trial judge would be left wholly without discretion, and the ill consequences adverted to by Bliss, J., in *Reg. v. Kennedy*, 3 N.S.R., 210, and by Denman, C.J., in *Sowell v. Champion*, 6 A. & E., 415, would often arise. He is, however, vested with a discretion in that behalf, the exercise of which is not subject to revision by any court. If in an action upon a note of hand, the making of which was in issue, a witness swore that, from correspondence with the party, he believed the note was made by him, but, upon cross-examination, he weakened and said he was not able to say, with any degree of certainty, that he had any correspondence with such party, the judge might, or might not, according to the view he took of the whole of his evidence, coupled with his demeanor, receive the note in evidence upon such proof. But if he did, the note would be in evidence for the purposes of comparison, and for all other legitimate purposes to which it could be applied as evidence.

Let it be assumed, however, that the judge in the supposed case should not have received it, but, nevertheless, the defendant, after the plaintiff rested, proceeded with his defence, and further evidence was elicited from his witnesses, more or less material, to show the making of the note, such

evidence, it is clear beyond controversy, may be relied upon and invoked to prove that defendant made the note, although the latter had not been tendered again, after such evidence was given. Any other view of this question would, it appears to me, often reduce trials to very much of a farce. Such a rule does not apply to civil cases, and I can see no reason or principle upon which it can be said a different rule ought to prevail in criminal cases. The authorities to which I have referred show that such a rule does not exist in the latter class of cases.

In Graham and Waterman on New Trials, vol. 2, p. 690, it is said :—

“ A new trial will not be granted because the judge improperly refused to non-suit, if the evidence subsequently adduced in the course of the trial is sufficient to sustain the plaintiff's case. It has often been decided that, although the judge errs in refusing to non-suit a plaintiff, still, if the evidence which ought to have been given by the plaintiff is given in the course of the trial, a new trial will not be granted for such error.”

*Lansing v. Van Alstyne*, 2 Wend. (N.Y.), 562 ; *Murray v. Judah*, 6 Cowen (N.Y.), 484 ; *Jackson v. Leggett*, 7 Wend. (N.Y.), 377, and other cases are cited in support of the text.

Those cases are entitled to greater weight, because at that time it would appear that a rule prevailed in that State requiring the judge to non-suit if there was no evidence to go to the jury.

It is surely a rule of common sense that if a defendant undertakes, by proceeding with his defence, to disprove the issues resting upon the plaintiff, or to prove his own, that any evidence he may adduce favourable to the plaintiff's case may be called to the latter's aid. There is no obligation upon a defendant to call witnesses ; he need not do so unless he thinks proper. But, if he does, their testimony, whether for him or against him, may be applied to the issues which are to be determined in the cause. It makes no difference in this respect whether the evidence relates to the execution of



a document or to some other fact. The trial of those issues does not terminate when the judge erroneously refuses, at the close of the case for the Crown, to direct an acquittal; or erroneously receives evidence, if the defendant proceeds with his defence.

The issues are being tried throughout the whole case, as well during the presentation of the case for the Crown as that for the defence. If, however, the principle sought to be enforced here is to govern, any evidence given after the improper reception of evidence, or after an erroneous refusal to direct an acquittal, must not be regarded. The case must be disposed of as if it had not been given. The witnesses, though sworn to give truthful testimony touching the issues being tried, and do so, in fact, still their evidence is only to be regarded, if at all, so far as it tends to establish the innocence of the accused. The statement of such a proposition is, it appears to me, its own refutation. The application of such a rule in practice would put a weapon of great power in the hands of a defendant. Moreover, causes would be tried in piece-meal fashion, or in sections, and each section must be regarded by itself.

If, when the evidence on behalf of both parties is closed, the judge is of the opinion that he was not justified in receiving the document upon which the case turns at the time when he did receive it, he is bound, according to the theory under discussion, to withdraw it from the jury and tell them to regard it as not proved, although several witnesses, subsequent to the stage at which he received it, gave strong evidence to establish it, and he is of opinion that upon the whole case it has been clearly proved.

If the rule is to have any operation at all, it must, I submit, be applied so as to exclude evidence given on the part of the prosecution after the document was received, as well as evidence given on the part of the defence, after the Crown rested.

It is said, however, that the objection may be removed, and can only be removed, by again tendering it in evidence,

that if it has once been received it is surely before the court at every stage of the case afterwards, and tendering it again would be an idle ceremony. If it should so happen that the corroborative evidence—the necessary evidence, if you will—given during the defendant's case, the right to tender it at after that stage, strictly speaking, would not exist. I have said that the course the trial shall take, viz., whether it proceeds beyond the case of the Crown, or of the plaintiff, or not, is wholly within the control and discretion of the presiding judge.

The case made out up to that time may be a very weak one, upon which a conviction could not possibly take place, but he is not obliged to stop it there and then. In very many cases it would be unwise to do so, in the public interests, as well as in the interest of the accused. If he declines to arrest it at that point, and the defence goes into evidence and concludes it, the period will then have been reached at which it is for the judge to say, not upon the evidence of the Crown alone, nor upon that for the defence alone, but upon the whole of the proofs, whether there is evidence to submit to the jury upon which they, as reasonable men, could reasonably, or fairly, find against the accused. The existence of this rule cannot be questioned, and it goes very far to prove that such a rule as that contended for does not exist.

I may add, in this connection, that it never was the law in England that a bill of exceptions could be resorted to in criminal cases. Russell on Crimes, vol. 3, 212; Roscoe's Criminal Evidence, 218; Archbold's Criminal Evidence, 184.

The admissibility of evidence is always a question of law, and is, therefore, for the judge. The weight or value of it, when admitted, is always a question of fact, and, therefore, for the jury. It is incumbent upon the judge to decide all preliminary questions which affect the admissibility of evidence; such, for example, as the sufficiency of proof to admit a document in evidence; the sufficiency of a search to obtain secondary evidence; whether a document was properly



stamped or not. As a general rule, if not absolutely, his ruling upon such questions cannot be reviewed. *Com. v. Gray*, 129 Mass., 474; *Walker v. Curtis*, 116 Mass., 98. These and other questions of a like nature are for the judge alone, and it would be error for him to submit them to the jury. But, once he passes upon them and admits the evidence, he must, if it is material, instruct the jury in the rules of law by which they shall weigh such evidence.

Where, however, the decision of the preliminary question of fact would decide the main issue, it seems that the judge should not decide the matter, but should admit the evidence provisionally, and leave the main question to the jury. *Stowe v. Querner*, L.R. 5 Ex., 155. That is, he simply passes upon its admissibility and leaves the rest to the jury.

In the present case the trial judge decided the preliminary question and ruled that the letter should be received. That was the extent of his ruling in the first instance. His receiving the letter under that ruling did not imply necessarily, if at all, that the defendant had, in fact, written it, nor that it contained the elements necessary to show defendant's guilt. Those were questions exclusively for the jury, and it was necessary that they should be submitted to them, and they were so submitted, and in that connection they were instructed that, for the purpose of determining whether or not the defendant wrote that letter, and that was the question before them, they might compare it with the other letter in evidence, in respect to which there was no doubt or dispute that it was written by him. The former letter was identified by defendant's own admission, upon the testimony of his wife, made during a conversation, in which he further admitted, according to Banks' version, that he had written a letter, the same, or similar in terms and purport, as that upon which the prosecution proceeded.

I have been referred to a number of cases bearing upon the relative duty of the judge and the jury. They all refer to preliminary questions. Two of them appear to be specially relied on and emphasized. *Bennison v. Jewison*, 12 Jur., 485; and *Boyle v. Wiseman*, 11 Exch., 364. I may be

permitted to say that I recognize their correctness, and, at the same time, to assert that the trial judge did not contravene, in any degree or particular, any one of the rules or principles they establish.

In the first of the two cases referred to, which was an objection upon a bill, the drawing, acceptance and indorsement were traversed. At the trial the defendant brought evidence to show that the bill was really drawn in London, and could not be received for want of a stamp. The judge, upon that evidence, rejected the bill and non-suited the plaintiff. A new trial was moved for, and it was contended that the non-suit was wrong, because where it was drawn was a matter of fact, and should have gone to the jury. At this stage of the argument, Pollock, C.B., said :—

“All intermediate questions of fact, on which the admissibility of evidence depends, are to be determined by the judge, and not by the jury. You cannot take an interlocutory verdict, or receive evidence *de bene esse*, leaving it, as matter to be decided by the jury, at the end of the case, whether it ought to have been received or not.”

If that bill required to be stamped it was altogether inadmissible as evidence, and the preliminary facts upon which the stamping should or should not be done was for the judge, and could not by any possibility be for the jury. If, however, it was a question of making or accepting, that question should have to go to the jury, even after the judge decided the preliminary question, that it was sufficiently proved to admit it in evidence.

The trial judge did not leave or submit any question touching the admissibility of that letter to the jury, but left only its terms, or effect, its identity, and whether the defendant wrote it, to them. For these reasons I am unable to perceive the application of the case mentioned.

In *Boyle v. Wiseman*, 11 Exch., 364, the question was whether a document in court was a copy of the original. The plaintiff sought to prove the contents of the letter, the alleged libel, by secondary evidence. The defendant's counsel thereupon interposed and handed the witness a document and

asked him if it was not the original letter. The defendant then asked permission to prove that it was the original, but the judge ruled he could not do so at that stage. The defendant gave no evidence, and a verdict for plaintiff was returned. A rule *nisi* for a new trial was granted, and made absolute upon the ground that the judge was bound to hear evidence on both sides and decide whether the document offered was the original or not, because, if it was, secondary evidence was not admissible.

Alderson, B., in the course of his judgment, said :—

“The plaintiff’s case was that the original letter was in France; the defendant’s that it was there in the court. Which is right? If the plaintiff’s case is right he is entitled to give the evidence. If the defendant is correct secondary evidence is inadmissible. Who, then, is to determine whether the document is to be received at all? Surely not the jury, for they are only to judge upon the evidence when received. It is the duty of the judge, and he must determine whether it ought to be received; and if, for that purpose, it is necessary that he should determine a question of fact, he must determine that question. . . . If he receives the evidence, and the court are of the opinion that he ought not to have received it, his decision will be overruled. But there is no question for the jury as to the reception of the evidence, for their duty does not arise until after the evidence has been received.”

There is not, and I say it with absolute confidence in its entire accuracy, one feature or fact in common between that case and the present. No such question arose and no such course was pursued in the latter, for the reasons already given, that the letter was received, and its effect, and only its effect and authenticity, submitted to the jury.

I venture to affirm that, if in that case the defendant, instead of declining to give evidence, had gone into evidence and produced and proved the original, and the case was otherwise properly dealt with and submitted to the jury, the defendant would not have been heard to complain that it

should be regarded from the standpoint of the plaintiff's case alone.

The case of *Welstead v. Levy*, 1 M. & R., 138, more closely resembles this case. There the question was whether the declarations of an indorser, made whilst he was holder, was evidence against a holder. Parke, J. :

"It is a question for me, on this evidence, whether the plaintiff is merely agent of Benham. It appears to me he is, and I think his declarations admissible. It will be for the jury afterwards to say whether they are of that opinion, and, if so, to judge of the effect of the declarations."

*Stowe v. Querner*, L. R. 5 Ex., 155, is to the same effect.

That, I submit, is substantially what the trial judge did there. The letter was received in evidence, and the question of defendant's guilt or innocence, his connection with, or authorship of it, was submitted to the jury. Defendant's guilt or innocence was the main issue in the cause, and, of necessity, the authorship had to be put to them, and, for greater certainty, and to aid the jury in reaching a conclusion whether he wrote it or not, and in no other aspect, they were instructed that they might compare it with the other one in proof, which was, of course, in his writing. That course did not, in any degree, involve any question of its admissibility. It was done, too, just the same as it would have been if there had been conflicting testimony, founded either upon actual knowledge of his hand-writing, or by means of comparison with other writings of his, on the part of witnesses, upon the question of whether he had written it or not.

I do not think that, under section 406, it was necessary there should be a writing at all. If not, then the defendant was not been prejudiced, even if my ruling in receiving the letter was wrong. The case, in that aspect, is covered by the proviso in sub-section *f*, sec. 746 of the Code. I do not suppose that any member of the court has any substantial doubt about defendant's guilt, having regard to his admissions, and, on that account, there is less reason to award a

new trial or to quash the conviction, because no substantial wrong or miscarriage was occasioned. The error alleged is that the trial judge improperly received the letter upon the proof then before him. It is, I understand, conceded on the part of one, if not both, of my dissenting brothers, that if Mrs. Dixon's evidence had been given before it was tendered it would have been clearly admissible. Now, surely this is one of the slips or mistakes which, if made, but being cured by subsequent proof, does not produce any wrong or miscarriage, which the proviso above mentioned was intended to cover. If the trial judge passed upon the admissibility of the letter upon insufficient proof, it is fair to assume—in fact, it cannot be doubted—that if it had been tendered again upon the proof which demonstrated its admissibility, the judge would have received it. This would, as I understand my learned brother Henry, have removed all difficulty. So that it is clear the question resolves itself into a matter of mere form only, not involving any question of substance, and therefore comes properly within the provision just referred to. The appeal should be dismissed.

MEMO.—Since the foregoing was delivered I have seen the new edition of Taylor on Evidence. In section 1870, referring to the question of comparison of hand-writing by the jury, this language is used :

“Therefore, in an action by the indorsee of a bill of exchange against the acceptor, who by his statement of defence denies the indorsement by the drawer, the jury may, by simply comparing the indorsement with the drawing, which is conclusively admitted to be genuine, find a verdict for the plaintiff, even though no witness be called to disprove the defence.”

WEATHERBE, J. (dissenting).—

The accused was convicted for a threat contained in a letter received in evidence against objection, without any proof of hand-writing.

It is contended that, after such illegal admission of



imony, and after the letter had been read to the jury, there was evidence introduced of an admission by the accused that he had written the letter, which cures its illegal admission. The evidence relied on is as follows: It was shown on the trial of Dixon, the present defendant, that in a former proceeding against one McDonald, who is the present prosecutor, Dixon was there examined and the disputed writing was there put into his hands. What Dixon said on that examination was excluded by the court on the trial now under review, but it was proved in this trial that, some time after another prosecution referred to was over, Dixon, in referring to such former prosecution, and identifying that trial by reference to the production by McDonald there of the disputed letter, remarked that he "was sorry he had anything to do or say with McDonald at all." It is hardly necessary to say that if this is put forward as an admission by Dixon that he is the author of the disputed letter, I should have thought it was unworthy the name of proof to secure a conviction in a court of justice. Though such a statement on the part of Dixon is not inconsistent with his authorship of the letter, it is quite consistent with his entire repudiation of such authorship. The mention of the production of the letter on the former trial was evidently merely for the purpose of identifying the circumstance of the prosecution of McDonald and Dixon's connection with that affair, and it was a surprise to me that it could have been suggested that the remark of Dixon respecting McDonald, and his regret that he had ever had anything to do with him, involved an admission by Dixon that he was the author of the letter. If it had not been mentioned it would not have occurred to me to look for such a meaning. Besides, if the fact of Dixon's being examined and the letter is to be used in order to draw inferences from it against him, how could evidence of his attitude at the time, as he disclosed by his words, be excluded from consideration? It is further contended that, if a presumption of admission of authorship of a letter against a person accused of writing a letter so too violent to be drawn from a remark by the accused that he regretted ever having had anything to do or say with

the person charging him with its authorship, then it was competent for the jury, without any evidence, to convict on a comparison of hand-writing alone with a genuine writing of the accused, put in evidence at the time the disputed writing was received without any proof.

If this is seriously urged, several answers are conclusive against the validity of such a contention.

In the first place, no writing can be compared by the jury unless first received in evidence, on *prima facie* evidence of admission of hand-writing. But, even if this were not the case, how are we to know, after the letter had been illegally read to them as prisoner's production on the trial, that they had ever compared the writings and unanimously passed upon the disputed letter. I believe the only answer offered to this is that the verdict of the jury itself discloses this.

The only direction from the learned trial judge, on the subject of this comparison of hand-writing, was a remark, at the very close of his charge, that the jury had a right to compare the letter in dispute with another letter in evidence. If the jury had been instructed that it was essential to compare the writings, and if, on comparison, they were unanimous in the opinion that the disputed letter was the prisoner's, they were to convict, but, if not, they were to acquit, then the verdict might be cited to indicate what the jury thought on the subject. It cannot, therefore, be pretended that the prisoner's hand-writing in the disputed paper has been passed upon by judge or jury. Even if there had been other evidence of hand-writing, under the direction given, this uncertainty would still obtrude itself.

Another answer against any inference being drawn from proof of hand-writing is the absence at the trial of the production of the genuine hand-writing contemplated by the law of evidence. The letter produced by Banks, in the direction to the jury, was not produced for the purpose of comparison. It was not produced on proof of hand-writing, but on the evidence of Banks of an admission by Dixon of a

letter such as Banks had described to him, without the production of any paper at the time. Though this may be evidence, under proper direction, to bind Dixon by the contents of such a letter, it appears to me incumbent on the prosecution, in introducing hand-writing for the purpose of comparison, to go further than the Crown has gone here. When Dixon was asked "if he wrote" such a letter as was described to him by Banks—the description being a recital of the alleged contents—Dixon said "he had, and was prepared to prove the case." Authorship was the essential point to be determined, as the parties understood—responsibility for the publication of the contents of the anonymous letter. Dixon was assuring Banks that he was responsible for the contents and publication of such a letter as Banks had described. He may have intended to impart more, and to have informed Banks respecting the very chirography itself of the letter, but it is not probable. That was utterly unessential, and the reply of Dixon that "he had, and was prepared to prove the case," would be essentially the truth, if he had only signed it or dictated it, or authorized the signing or dictation of it, or, possibly, if he had only approved of the letter referred to.

Neither at the time of offering the paper, nor at any time during the trial, was the attention of counsel for the defence directed to the question of hand-writing, and, for anything we knew, the letter may have been type-written, and there was therefore no notice whatever to prisoner or his counsel that the hand-writing alone of that letter (the admission of which as evidence in the case was objected to) was to be relied on to convict.

There is another obvious reason, I should have supposed, even if the procedure here were otherwise correct), why the conviction cannot be sustained. If a conviction is to depend upon proof of hand-writing by comparison for the introduction of documents into evidence on the trial, it would, I think, be extraordinary if that comparison were not required to be in open court, in the presence of the prisoner, the judge and



counsel, as well as the jury. In this case no witness was called to speak to this letter, and no evidence given of hand-writing or admission of authorship of the disputed letter, and there was no proof offered by comparison before the introduction of the letter, though exception was taken to its being read in evidence to the jury. Nor even after the jury had heard the letter read as a letter written by the prisoner was any comparison made by witnesses in court, nor was any comparison permitted to prisoner, or his counsel, or the jury, during the trial, or while the jury were in court. If there had been the slightest intimation or suggestion of comparison of hand-writing for the purpose of fixing the guilt of the prisoner during the trial, or in open court, witnesses—possibly experts—might have been called, which might have changed the entire aspect of the case, and an acquittal might have been the result.

I think no case will be found where a conviction or a verdict has been the result of a comparison of hand-writing where the comparison was not in open court, in the presence of the parties and their counsel.

It will be noted that in this case the letter was received without proof when tendered, and read to the court and jury. I offer no opinion as to whether, even if after such reception legal evidence were heard, this would cure the omission of proper preliminary proof.

I am, for the above reasons, of opinion the conviction cannot be sustained.

HENRY, J. (dissenting).—

The accused was indicted for unlawfully threatening to accuse Malcolm McDonald of having committed an offence against the Nova Scotia Liquor License Act, with intent to extort money. The alleged threat was contained in a letter. The Crown sought to prove that this letter was written and sent by the prisoner to McDonald, the prosecutor.

The contention, on behalf of the accused, that this letter was improperly received in evidence, was not disputed by the learned Attorney-General at the argument, and I understand

that the members of this court with whom I am unable to agree in this case do not decide that it was properly received, but justify the course of the learned judge in submitting this letter to the jury, solely upon the ground that after it was received further testimony was given which might have justified the learned judge in receiving it. The only evidence which could possibly have been relied upon by the Crown to warrant the reception of the letter was that of Havelock Banks. It is as follows :

“ Had a conversation with the accused, after he was arrested upon this charge, in the police station; he was then under arrest. We talked about his arrest at the instance of the prosecutor, McDonald. The accused spoke of a letter he had written to the prosecutor, and said he was sorry he had done it; he didn't think there was any harm in it. He also said he had written McDonald that if he would square up some matter between them all would be well, otherwise he would inform against him.”

As already mentioned, it was not pretended at the argument, nor do I understand any member of the court to hold, that this evidence warranted the reception of the letter. Nevertheless, it may be as well to note in passing, that if it could be said to justify the reception of the letter, its operation would be by way of an admission by the accused that he wrote the letter, for the sending of which to the prosecutor he was indicted. An admission that he sent a letter, which, according to the admission as deposed to, contained some vague threat, which does not even appear to have been criminal, is, obviously, not an admission that he sent the letter upon which the charge was made. Of course, the evidence was clearly receivable as an admission that the accused wrote a letter to the prosecutor, and it would, with other evidence, be entitled to its proper weight against him to that extent, but it wholly fails as evidence of identification, and it is only in that way that it could avail to justify the reception of the incriminating letter in evidence.

But it was argued on behalf of the Crown, and some of

the members of this court hold, that evidence given subsequently to the reception of the letter, which evidence is said to identify the letter charged as that spoken of by the accused in his conversation with Banks, made good the previous admission of the letter and justified the learned judge in submitting it to the jury.

Here it is necessary to refer to the learned judge's charge. Perhaps the shortest and best way to show the course taken by the learned judge is to insert here his own report of it, sent up in the case reserved. It is as follows :—

“ After defining the crime charged and explaining its nature and the elements necessary to constitute it, I called the attention of the jury to the conversation detailed by Banks as having taken place between him and the accused after his arrest upon this charge, in which he admitted having written a letter to the prosecutor, wherein he stated that if the prosecutor would square up some matter between them all would be well, otherwise he would inform on him, and that he was sorry he had written it. If they accepted Banks' version of that conversation, there was evidence that he had written a letter to the prosecutor in substance much the same, if not the same, as that produced, there was direct proof that the accused had, very soon after the date of the letter, given information to Banks which led to a liquor prosecution against McDonald. I also called their attention to the evidence of Mrs. Dixon, which, as to the identity of the letter produced with that referred to by the accused in the conversation with Banks, was important. She testified that in that conversation the accused told Banks he had been arrested by the prosecutor on a charge of sending him a threatening letter, and Banks asked him what letter, and the accused replied, “ Don't you remember the letter Mr. W. B. Wallace showed in court ? ” Banks replied he did, but didn't think they were going to do anything like arresting him, and the accused then said he was sorry he had anything to say or do with McDonald. It was proved that the letter complained of was in court, and that Mr. Wallace had shown it to the accused on the trial of the liquor case. I recapitulated

the leading facts, viz., that the liquor was purchased at a particular hour on the 17th, at the instance of the accused; that the letter on which the charge was based was written on the 21st, and that the letter to Banks, about which there was no dispute, and which was, as to the charge of selling liquor, on identical terms with the former, was written on the 26th of September, so that one step followed the other in regular sequence. I instructed them that the facts were wholly for them, and then said that they should first determine whether or not—assuming that they believed Banks' version of the conversation—the accused, in that conversation, had reference to the letter relied on, and that, in connection with that enquiry, they had a right to compare the letter produced by the prosecutor with that produced by Banks, in order to determine whether the former was or was not written by the accused."

The questions in the case stated are as follows :—

- 1st. Was the letter M/2 admissible upon the proof?
- 2nd. Was the direction to the jury on the question of comparison of hand-writing proper?
- 3rd. Was there evidence, irrespective of the letter, upon which the jury might properly have convicted the accused of the charge in the indictment?

As to the first question, I am clearly of the opinion, for the reasons already stated, that the letter was not admissible upon the evidence given up to the time when it was received.

It remains, however, to consider the question, which was the principal question discussed at the argument, whether, assuming that the letter was improperly admitted, evidence received subsequently to its admission could justify its being submitted to the jury as evidence. Here, it must be noted, that there is no pretence that, after the additional evidence was given, it was tendered or received a second time.

Assuming that the additional evidence relied upon by the Crown was sufficient in its nature to make good the necessary identification, I am still of the opinion that the letter should

not have been treated as proved, and should not have been submitted to the jury.

It is necessary here to consider the functions of the judge and the jury in this connection.

Now, while the general rule is that questions of law are for the judge and questions of fact for the jury, the rule is subject to a very important exception, namely, that all facts upon which the admissibility of evidence depends must be determined by the court and not by the jury. Numerous decisions establish this exception as itself a strict rule, no departure from which has been sanctioned. So it is that in the present case, before the letter in question could be legally submitted by the learned judge as evidence to the jury, he was bound to decide the question of fact—whether the letter was proved ; not conclusively proved so that the jury must necessarily treat it as having been sent by the accused to the prosecutor, but proved sufficiently to be received as evidence.

In all instances in which the admissibility of evidence, whether oral from a witness or written in a document, depends upon questions of fact, these questions must be determined by the judge, and by the judge only, before the evidence can be allowed to go to the jury. The judge first tries the question of fact, as to admissibility. The jury afterwards determines the issue of fact upon the evidence admitted. If the judge admits evidence without proper proof the jury cannot cure the mistake. The mistake can be corrected only by the court. This position, with its controlling effect upon the present case, is clearly established in the decisions to which I shall now refer.

*Corfield v. Parsons*, 1 C. & M., 730, was a case in which, on a motion for a new trial, it was contended that the evidence was strong to show that a person who made certain declarations was the plaintiff, and that, accordingly, the declarations ought to have been admitted, or, at all events, that the question whether this was the plaintiff or not ought to have been left to the jury.

Lord Lyndhurst, C.B.:

"Did you ever know an instance where a judge stopped a cause to take the opinion of the jury as to the identity of a person, to make his declarations evidence?"

Bayley, B.:

"Whether the evidence was receivable or not was a question for the judge, and he is to form his opinion whether the circumstances are sufficient to identify the party so as to warrant the reception of evidence of his declarations, and the court has a right to see whether the evidence was reasonably sufficient to prove the identity, and whether the judge was right in the opinion which he formed."

Lord Lyndhurst:

"It is not a point for the consideration of the jury, but a question for the judge, whether there is sufficient evidence of identity."

Lord Lyndhurst, in giving judgment, said:

"It is said that the learned judge should have left the question of identity to the jury. I have never known a case where such a course was adopted. I have always understood, and I think it convenient that it should be so, that the whole matter as to the grounds for the admissibility of the evidence rests with the judge."

In *Bennison v. Jewison*, 12 Jurist, 485, Pollock, C.B., expressed himself as follows:

"All intermediate questions of fact, on which the admissibility of evidence depends, are to be determined by the judge, and not by the jury. You cannot take an interlocutory verdict, or receive evidence *de bene esse*, leaving it as a matter to be decided at the end of the case, whether it ought to have been received or not."

This language seems to me to be emphatically applicable to the present case.

In *Boyle v. Wiseman*, 11 Ex., 360, Alderson, B., dealt with a question as to the reception of secondary evidence as follows:

"Who, then, is to determine whether that document is to be received at all? Surely not the jury, for they are only to judge upon the evidence when it is received. It is the duty of the judge, and he must determine whether it ought to be received; and if for that purpose it is necessary that he should determine a question of fact, he must determine that question, and the party against whom the judge decides has his remedy by applying to the court to correct the error, if the judge has decided wrongly. The question of fact must be submitted first to the judge and afterwards to the court. If he receives the evidence and the court are of opinion he ought not to have received it, his decision will be over-ruled. But there is no question for the jury as to the reception of the evidence, for their duty does not arise until the evidence has been received."

In *Doe v. Davies*, 10 Q.B., 314, Denman, C.J., said:—

"There are conditions precedent, which are required to be fulfilled before evidence is admissible for the jury . . . . The judge alone has to determine whether the condition has been fulfilled. If the proof is by witnesses, he must decide on their credibility. If counter evidence is offered he must receive it before he decides."

In *Commonwealth v. Culver*, 126 Mass., 464, Lord, J., said:—

"There may be, however, and commonly are, two questions—first, the competency of the evidence, and second, the weight of the evidence. The former is always a question of law and the latter is always a question of fact. The prisoner has always the right to require of the judge a decision of the competency of the evidence, and even after the judge has decided the evidence to be competent the prisoner has the right to ask of the jury to disregard it, and to give no weight to it, because of the circumstances under which the confessions were obtained."

A few words of Martin, B., in *Cleave v. Jones*, 7 Ex., 421, will conclude my quotations from opinions upon the subject:

"Whenever an objection is taken to the admissibility of



vidence, the judge is bound to try any collateral issue on which it depends, and to determine the law arising from the facts proved in the same manner as a jury decides matters of fact. In *Wright v. Doe d. Tatham*, 7 A. & E., 313, a preliminary question of that kind arose, and the judge came to a certain conclusion; but that was subject to review in a court of error, like any other matter of fact, though in one sense it was a matter of law."

Coming back to the present case, the following considerations seem to me to clearly establish the position that the evidence in question was illegally submitted to the jury.

First, it is clear, if not admitted, that there was no ground for receiving it at the time when it was received. That is, the adjudication made by the learned judge was wrong. That that is the only adjudication which he made on the subject. That some of the evidence afterwards given might have justified the adjudication is a matter beside the question. That other evidence was not passed upon—not considered. As to the witnesses who gave this other evidence, the learned judge, to use the very words of Denman, C.J., already quoted, was bound to "decide on their credibility." He did not do so.

If the only decision given by the learned judge was erroneous, the fact that, afterwards, other evidence was given which he might have made a good decision but did not make any, is surely immaterial. Let us put the matter in another way. The facts on which the decision was made were insufficient. The facts which are said to have been sufficient were never tried.

It will be conceded that in a trial before a judge without a jury, a decision in favor, say, of the plaintiff, admittedly without evidence to support it when given, could not be made good by evidence afterwards received by the judge, but never considered or passed upon by him. I am unable to discover any difference between the case suggested and the present case. In both cases the difficulty is constituted by the obvious consideration that evidence not passed upon is no better than if it had not been received at all.



The practice in connection with the now obsolete bill of exceptions illustrates the impossibility of supporting a decision of the kind in question by evidence received after it is made. According to that practice, the bill had to be tendered at the time the decision was made, and certified by the court or judge making the decision. Buller, N.P., 315; T. Raymond, 405; Salk. 228; 11 S. & R., 270; 2 Swan. 77; 9 Johns. 345. Therefore, subsequently received evidence would have no place in the bill, and could not come before the court of review. *Kensington v. Inglis*, 8 East, 280; *Spalding v. Inhabitants of Alford*, 1 Pick., 37.

The answer to the second question stated depends upon the answer to the first. If the correct answer to the first question is that the threatening letter was improperly submitted to the jury as evidence, it follows that it was wrong to allow them to compare it with the other letter in evidence for the purpose of determining whether it was written by the accused or not. It was not contended, on behalf of the Crown, that the disputed writing—that is, the threatening letter—could be submitted to the jury for comparison without being first received in evidence. If it was improperly received, the case is the same as if it had not been received at all. If it should not have been received, it should not have gone to the jury for any purpose. The following cases show specifically what is, of course, covered by the decisions to which I have already referred in discussing the first question, namely, that it is only documents which are proved which can be compared by the jury with other documents. *Griffith v. Williams*, 1 C & J., 47; *Doe d. Perry v. Newton*, 5 A. & E., 514; *Solita v. Yarrow*, 1 M. & R., 133; *Doe d. Mudd v. Suckermore*, 5 A. & E., 703.

The third and last question is as follows :—

“ Was there evidence, irrespective of the reception of the letter, upon which the jury might have properly convicted the accused of the charge in the indictment ? ”

I am of the opinion that this question should not have

en stated. Subject to what may be the effect of sec. 746, sub-sec. *f*, of the Code, to which I shall presently refer more fully, it is clear that whether with or without the letter itself being received in evidence the prisoner should be convicted, is a question for the jury and not for the court. It is a question of fact, not a question of law. See *Reg. v. Lloyd et al.*, 19 Ont. R., 352. Moreover, if we take away the letter and the opportunity to compare it with the other letter, which is said to have been identified, there is nothing left tending to support the charge but the insufficient and vague admission made by the prisoner to the witness Banks, with which I dealt at the outset. It is, at least, very doubtful if this admission amounted to an acknowledgment of any crime whatever, and there is no reason for even supposing that the jury, who, of course, proceeded wholly upon the evidence, would have found that it did.

Finally, it is necessary to advert to a section of the new Criminal Code, of which no mention, however, was made at the argument. Sec. 746, sub-sec. *f*, is as follows :

" Provided that no conviction shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial."

There is one short and clear ground for holding that this provision is inapplicable to this case. So far as the matter of the improper reception of evidence is concerned, it applies only to cases in which some evidence has been improperly received, but in which, in the opinion of the court, the proper reception of that evidence has occasioned no substantial wrong or miscarriage on the trial. Now, admitting, for the sake of argument, what, in my opinion, is not affected by the provision, namely, that it covers a case where some evidence material to the guilt or innocence of the accused has been improperly received, and that it enables the court, on appeal, to determine that without such material but

improperly received evidence there is sufficient other evidence to convict the accused and accordingly to confirm the verdict of guilty, it is clear, if it has that scope and effect at all, that it is applicable only to cases where the evidence improperly admitted is cumulative and clearly superfluous by reason of the existence of unexceptional evidence sufficient to support the conviction. This is not a case of that kind. Take away the letter—the improperly received evidence—and there is nothing left which could seriously be pretended to justify the conviction.

Besides, the accused was convicted of sending, and, if properly convicted, should be punished for sending, that very letter. If you take it away, a conviction for having sent it, as distinguished from having sent some such letter as would conform to the prisoner's alleged admission to Banks, cannot stand.

Nothing of the kind could, in my opinion, be more undesirable than that I should venture to suggest any general rule as applicable to the construction of the provision in question. I know of no decision upon the question whether the court may upon a case reserved confirm a conviction because in the opinion of the court there is sufficient legal evidence to support a verdict of guilty, where material evidence has been improperly received. But I do venture to suggest that, in the absence of a much more direct and unmistakable enactment to that end, there is reason for hesitating to hold that the court has been substituted for the jury in criminal cases to the extent which would be involved. Some remarks of the learned judges in a comparatively recent case in England are in point, though not necessarily authoritative, since they had not in England then, nor have they now, such a provision as the one in question. In that case certain evidence was improperly admitted. It was held that the verdict of the jury must be taken to have been founded upon that evidence, as well as upon the evidence properly admitted, and the conviction was held to be bad, notwithstanding there was sufficient evidence, apart from the evidence improperly received, to support the conviction.

Pollock, B., said : " I have come to the same conclusion, and am of opinion that the question is of some importance, because it might arise also where a judge had allowed circumstantial evidence to be put in, which should not have been put in. It is clear, to my mind, that if, in a prosecution for bigamy, the judge allowed an informal certificate of the marriage to go to the jury, with the evidence of any person who was present on the occasion, a conviction under such circumstances could not stand, and it could not be sufficient for that to say there was ample evidence from bystanders that the marriage took place. If it were so, the consequence would be to put on this court the functions of the jury. I am, therefore, of opinion that this conviction should be quashed."

Mathew, J., said : " Here, the judge directed them to rest upon evidence which was not evidence, and I am, therefore, of opinion that the verdict ought not to stand." *Reg. Gibson*, 16 Cox C.C., 186.

In this connection see also the recent decision of the House of Lords, in *Bray v. Ford* (1896), A.C., 45 ; 65 L.J.Q., 213.

I am of the opinion :

1st. That the exhibit M/2, being the alleged threatening letter, was improperly received in evidence and improperly submitted to the jury.

2nd. That the alleged threatening letter, being improperly received in evidence, the direction of the learned judge to the jury in respect of comparison of hand-writing was improper.

3rd. That the third question, not being a question of law, was not a question which could properly be stated as a question for the Court of Appeal, and that, assuming this question to be one upon which the court should express an opinion, there was not evidence, irrespective of the letter itself, upon which the jury could properly have convicted the accused of the crime charged in the indictment.

*Conviction affirmed,*  
(Weatherbe and Henry, JJ., dissenting).

## [COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE WÜRTELE, J.

## THE QUEEN v. WEIR and others. (No. 3.)

*False return by bank official—Evidence of acts constituting a higher offence — Swearing the jurors — Irregularity — Right of challenge — Indictment — What amendments allowable—Comment on failure of accused to testify as to immaterial fact—Comment addressed to prisoner's counsel by Crown prosecutor—Canada Evidence Act, s. 4—Bank Act (Can.) ss. 85, 99—Cr. Code 667, 723.*

1. The fact that the jurors were set aside, rejected or sworn as they were drawn, without first calling the full number required for a jury, does not invalidate the trial, nor constitute a deprivation of the full right of challenge.
2. The court may, at the trial, amend an indictment if the amendment does not change the character or nature of the charge, and if the accused cannot be prejudiced by the change either as regards the evidence applicable or the defence raised.
3. If the amendment asked would substitute a different transaction from that first alleged, or would render a different plea necessary, it ought not to be made.
4. Where, during the address to the jury by the prisoner's counsel, the counsel for the Crown interjects a remark, in the hearing of the jury, intimating that the prisoner could have given evidence as to an alleged occurrence then being referred to, and it appears that the ascertainment of whether or not such occurrence took place is not in fact material to the issue, such comment is not a ground for ordering a new trial.

DECIDED : December 6, 1899.

The defendant William Weir and two others were indicted for making a false bank return, the form of the indictment being as set forth *ante* page 102 (*The Queen v. Weir* No. 1.)

The defendants were allowed separate trials and the trial of William Weir took place from the 20th to the 27th days of November, 1899. On the last mentioned day, after all the evidence had been put in and before counsel for the defence had addressed the jury, the Court ordered that the indict-

ment be amended by inserting the word "containing" before the words "a wilful, false and deceptive statement of and concerning the affairs of the said La Banque Ville Marie," and the amendment was then formally made. The jury brought in a verdict of "Guilty with a recommendation to the mercy of the Court."

On the next day counsel for the defence moved that certain questions of law which had either arisen on the trial or were incidental thereto should be reserved for the opinion of the Court of Appeal.

MONTREAL, December 6, 1899.

WÜRTELE, J.—

The first point raised is that the indictment should have been quashed upon the demurrer which the defendant produced before pleading to the indictment, first, because it did not disclose an indictable offence; secondly, because it did not charge that the defendant had made any wilfully false and deceptive statement in any return respecting the affairs of the bank; and thirdly, because it did not specify any such wilfully false and deceptive statement.

[The learned judge refused to reserve a case upon this point, the reasons given being in substance the same as those upon which the demurrer was overruled, *ante* p. 102.]

The second point raised by the defendant is that the defendant is charged with having made under the requirements of section 85 of "The Bank Act" a false return and that the penalty for such an act is not the imprisonment of the person who has made such return but the payment by the bank itself of a sum of money.

Section 85 orders the making of a monthly return by every bank of its financial position and provides that it shall be signed by the president and certain other officials of the bank, and it imposes a penalty on any bank neglecting to make up and send to the Minister of Finance and Receiver General such monthly return within the first fifteen days of

## [COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE WÜRTELE, J.

## THE QUEEN v. WEIR and others. (No. 8.)

*False return by bank official—Evidence of acts constituting a higher offence — Swearing the jurors — Irregularity — Right of challenge — Indictment — What amendments allowable—Comment on failure of accused to testify as to immaterial fact—Comment addressed to prisoner's counsel by Crown prosecutor—Canada Evidence Act, s. 4—Bank Act (Can.) ss. 85, 99—Cr. Code 667, 723.*

1. The fact that the jurors were set aside, rejected or sworn as they were drawn, without first calling the full number required for a jury, does not invalidate the trial, nor constitute a deprivation of the full right of challenge.
2. The court may, at the trial, amend an indictment if the amendment does not change the character or nature of the charge, and if the accused cannot be prejudiced by the change either as regards the evidence applicable or the defence raised.
3. If the amendment asked would substitute a different transaction from that first alleged, or would render a different plea necessary, it ought not to be made.
4. Where, during the address to the jury by the prisoner's counsel, the counsel for the Crown interjects a remark, in the hearing of the jury, intimating that the prisoner could have given evidence as to an alleged occurrence then being referred to, and it appears that the ascertainment of whether or not such occurrence took place is not in fact material to the issue, such comment is not a ground for ordering a new trial.

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On the next day counsel for the defence moved that certain questions of law which had either arisen on the trial or were incidental thereto should be reserved for the opinion of the Court of Appeal.

MONTREAL, December 6, 1899.

URTELE, J.—

The first point raised is that the indictment should have been quashed upon the demurrer which the defendant produced before pleading to the indictment, first, because it did not disclose an indictable offence; secondly, because it did not charge that the defendant had made any wilfully false and deceptive statement in any return respecting the affairs of the bank; and thirdly, because it did not specify any such wilfully false and deceptive statement.

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Section 85 orders the making of a monthly return by every bank of its financial position and provides that it shall be signed by the president and certain other officials of the bank, and it imposes a penalty on any bank neglecting to make up and send to the Minister of Finance and Receiver General such monthly return within the first fifteen days of



each month. Then section 99 makes it a criminal offence punishable by imprisonment, for the president and certain other officials of a bank to make and sign a wilfully false and deceptive return. The two offences are entirely different : one is the omission to make up and send in a monthly return, for which omission the bank itself is punishable ; and the other is the act of the president and of some other official of the bank of wilfully making and signing a false and deceptive return or statement for which act the president and the other officials of the bank are personally liable and are punishable by imprisonment. In the present case, the bank is not charged with having omitted to make up and send in a return, but the defendant is accused of having made and signed a false and deceptive one. I am of opinion that the second point is not well taken.

The third point raised by the defendant is that evidence was improperly admitted, *first*, respecting notes or memoranda upon which the defendant was either charged or was liable to be charged with a higher crime than that created by section 99 of "The Bank Act" ; *secondly*, respecting the amounts entered under the several headings contained in the return without any specification of any false statement having been given in the indictment ; *thirdly*, respecting a statement made by Godfrey Weir to the witness Edmond Joseph Labrecque when the defendant was not present ; and *fourthly*, respecting the interpretation by the witness Frederick William Taylor of the following entry made by the defendant in the books of the bank, viz: "Cash counted this 21st January, 1899, and found correct, \$236,965, less \$173,000 in vault ; other items also chequed. (Signed) W. Weir, President."

It appears by the evidence that the defendant had signed by procuration without authority promissory notes representing no value to the amount of \$223,910.61 and that these notes had been included in the return under the heading of "Current loans." The act of signing notes in this manner constitutes an indictable offence punishable by imprisonment for life. These notes were absolutely worthless and the

proof of this fact and of the fact that they were included in the return established its falsity and its deceptive nature, and such proof was consequently admissible. But the defendant pretends that as the unauthorized making of a note by procuration constitutes a higher offence than the making a wilfully false and deceptive bank return, this evidence was inadmissible, and he founds his pretention on section 99 of "The Bank Act," which enacts that the making such a return is a misdemeanor punishable by an imprisonment not exceeding five years, unless it amounts to a higher offence. This enactment only means however that the making such a report may be accompanied by circumstances which may make it more than a misdemeanor, as for instance if it should be the result or the overt act of a conspiracy to defraud. In such a case the lesser offence is merged in the higher one ; it does not preclude the evidence of acts which, although criminal, are distinct from the making of the report but have the effect of falsely representing the financial position of the Bank.

The way to establish that a bank return is false and deceptive is to prove the inexactitude and falsity of the amounts entered under the various headings ; and, under the general charge of the bank return being false and deceptive, it was legal to show the inexactitude and falsity of the amounts entered under all of the headings or only of some of them. No specification was necessary in the indictment and no particulars had been asked for and allowed which might have restricted the proof.

Godfrey Weir was one of the directors of the bank. The directors of a bank constitute its governing body and are its visible and thinking and knowing head ; they are presumed to know its condition and its business and all the general facts which go to make up that condition and business as shown by the entries on its regular books, and it is in fact their duty to know these things in the exercise of their official functions. An admission made by a director as to the condition of the bank is therefore relevant and may be proved. It was sought to prove an admission which had been

made by Godfrey Weir to the witness Edmond Joseph Labrecque, not to contradict the defendant, but to establish the fact that \$173,000 of the signed notes of the bank had been taken and were not in the treasury and that this fact was known to the directors. This evidence was therefore admissible. If, however, this evidence was improperly admitted, no miscarriage of justice can have resulted from its admission as the fact that notes for the amount of \$173,000 had been abstracted and were missing was proved to have been admitted by the defendant himself to the witnesses Edmond Joseph Labrecque and Frederick William Taylor.

The evidence given by Frederick William Taylor with respect to the entry made by the defendant in the books of the bank on the 21st January last (1899) was not taken for the purpose of explaining its meaning, but for the purpose of ascertaining the reason for which it had been made. On being questioned by Mr. Taylor, the defendant stated that he had made the entry in the ambiguous manner in which it was worded, so as to prevent the employees of the bank becoming aware of the defalcation. This was proper and admissible evidence. The third point is therefore also untenable.

The fourth point is that the direction and rulings of the trial judge were erroneous in stating : first, that it was sufficient to charge the accused with the making of a false bank return without specifying the wilfully false and deceptive statement made in the return ; secondly, that there was no difference between charging that a person made a false bank return, or that he made a wilfully false statement in a bank return ; and thirdly, that the first word " statement " in section 99 of the " Bank Act " was in effect the synonym and equivalent of the word " return " or the word " statement " in its larger sense in the same section.

I have answered the two first sub-divisions of this point in my remarks on the first point, and it is unnecessary to say anything further. As regards the third sub-division, it seems clear that the making a wilfully false and deceptive statement in a bank return makes the return in which such statement

is contained a wilfully false and deceptive return. Then the latter part of section 99, which states that any president or other official of a bank, who prepares and signs any such statement, return or report, or uses the same with intent to deceive or mislead anyone, shall be held to have wilfully made such false statement, shows that it is immaterial whether any such person is accused and indicted for having made a false and deceptive statement in a return or report or for having made a false and deceptive return or report. The nicety of the distinction is such that the difference can have no legal effect. This point is therefore in my opinion not well taken.

The fifth point is that the jury was impanelled illegally and in a way to deprive the defendant of his full right of challenge.

The answer to this point will be short. The jury was impanelled according to the manner invariably followed in this Court ; and far from being deprived of his right of challenge the defendant challenged every juror who was called, either for cause or peremptorily. It is true that the jurors drawn were either set aside or rejected or sworn as they were drawn, and that the number which might be thought sufficient to provide a full jury was not drawn before the jurors were called to be sworn ; but the omission to follow this provision which is only directory cannot affect the impanelling of the jury. The fifth point is not maintainable.

The sixth point is that the amendment to the indictment, which was made by introducing the word "containing" was improperly made and was not within the meaning of section 723 of the Criminal Code, and that it completely changed the character of the offence charged against the defendant.

The indictment as drafted contains a statement of all the ingredients which constitute the offence with which the defendant is charged, and is sufficient ; but its wording is faulty in construction and the gist of the offence is contained in a paraphrase. However it is not, as I have already stated, bad on that account, and its averments clearly indicate to

the defendant what he is accused of and what he is called upon to answer. Section 723 of the Criminal Code allows the Court to amend a defective statement, in an indictment, of anything requisite to constitute the offence, provided it be of opinion that the accused has not been misled or prejudiced in his defence by such defective statement. The amendment in this case consists in filling up a hiatus and connecting two phrases with the word "containing." This addition and amendment does not change the sense in any respect, and only corrects the wording in a literary point of view. The correction in no way changes the character or nature of the offence, and as the defendant knew to the same extent before and after the amendment what he was accused of, he was neither misled nor prejudiced by it. The test whether a defendant can be prejudiced by such an amendment is whether a defence under an indictment as it originally stood would be equally available after the amendment is made, and whether any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other; in such case the amendment would not be one by which the defendant could be prejudiced in his defence. In fine, if the transaction is not altered by the amendment but remains precisely the same, the amendment ought to be allowed, but if the amendment would substitute a different transaction from that alleged or would render a different plea necessary it ought not to be made. In this case the transaction alleged in the indictment is the same after the amendment as before it was made, and the amendment cannot necessitate a different plea from the plea of not guilty which was made when the defendant was arraigned. The sixth point is therefore unfounded.

The seventh point is that the indictment as amended did not disclose an offence, and that it should have been quashed on the motion made by the defendant to that effect.

The amendment in no wise changed the nature of the indictment and as it was sufficient and legal before the amendment was made, so it likewise was after it was made, and the

motion to quash the amended indictment was therefore properly dismissed. The seventh point cannot therefore stand.

The eighth point is that the defendant was entitled to particulars of the false statement which the amended indictment charged him with.

The amendment was made after the evidence had all been put in and before counsel for the defence had addressed the jury. I was of opinion that the defendant had not been misled or prejudiced in his defence by the defective statement of the offence charged and that there was consequently no necessity to adjourn the trial, and that there was no more necessity after the amendment than before it for particulars, and the demand for particulars was therefore properly refused. The eighth point is therefore without legal foundation.

The ninth point is that the Crown Prosecutor at the trial and during the address of counsel to the jury commented upon the failure of the defendant to testify.

While Mr. Macmaster the counsel for the defendant was addressing the jury he said : " Now, who could have given " the best evidence with regard to the \$173,000? You are " entitled to the best proof. Who could have told you " whether the \$173,000 had been taken to New York, bag " and baggage, or not? Mr. Lemieux himself ; " and then the Honourable Mr. Fitzpatrick, the Crown Prosecutor, interjected the words : " or Mr. Weir." These words were not addressed to the jury but to Mr. Macmaster across the space separating them, and they were uttered in a conversation tone. It was perfectly immaterial whether the \$173,000 were taken to New York or not, by Mr. Lemieux, as it was abundantly proved that long after Mr. Lemieux's trip to New York the notes for that amount were not in the treasury to the defendant Mr. Weir's own knowledge. Now, does what took place fall within the prohibition of " The Canada Evidence Act, 1893? " Section 4 provides that every person charged with an offence shall be a competent witness on his own

behalf, and that the failure of such person to testify shall not be made the subject of comment by counsel for the prosecution in addressing the jury. The Honourable Mr. Fitzpatrick made no comment when addressing the jury on the defendant's failure to testify, and the interjection which he uttered was not a comment, nor was it made during his address to the jury. The case does not fall under the prohibition created by "The Canada Evidence Act, 1893," and the interjection cannot therefore form the ground for a new trial.

But if the fact that the Crown Prosecutor uttered the interjection is a violation of the spirit if not of the letter of the provision of "The Canada Evidence Act, 1893," respecting comment on the failure of the accused or of his wife to testify, would this violation of the spirit of the law be sufficient to affect the verdict and entail a new trial?

At the argument the case of *The Queen v. Corby*, 1 Can. Cr. Cas. 457, was referred to; but in that case the counsel for the prosecution commented on the failure of the wife of the accused to testify, while addressing the jury in reply, and it therefore has not a direct application to the present case. In this case counsel for the defendant was alluding to the fact that no proof had been made by the Crown that the notes amounting to the sum of \$173,000 had been taken to New York and had stated that proof could have been made on this head by Ferdinand Lemieux, the chief accountant, when the Crown Prosecutor interjected the words "or Mr. Weir." Now this fact was perfectly immaterial to the issue, which simply was that the notes had been purloined and were missing when the defendant made and signed the report to the Minister of Finance and Receiver General and that he knew that the bank did not then possess them. That the notes were not in the possession of the bank, and that the defendant knew it when he made and signed the report, had been proved; and whether the notes had been taken to New York by Ferdinand Lemieux was an incident which was immaterial and could have no bearing on the issue of the case, while



what the statute prohibits is comment on the failure to testify of a nature to affect the issue. Although the interjection may have been improper, no substantial wrong or miscarriage could be or was occasioned by it in face of the proof which had been made of the circumstances of the case, and it is therefore not a matter for which the verdict can be set aside and a new trial ordered. The ninth point is not therefore well taken under the terms of the law and in view of the facts and circumstances as they occurred.

The tenth and last point is that the judge in charging the jury stated that the defendant was upon his trial for making a false and deceptive report to the government which is not a criminal offence in law, but merely subjects the bank making such false return, to a penalty.

I have answered this point in my remarks respecting the second point and I have nothing to add. The last point is also untenable.

I have no doubt in my mind as to the unsoundness of the points which I am asked to refer to the Court of Appeal for its opinion, and I consequently refuse to reserve the questions of law submitted to me and dismiss the defendant's motion for a reserved case.

*Motion refused.*

**Note:** *The arraignment of accused persons.*

The arraignment of prisoners against whom true bills for indictable offences have been found by the grand jury consists of three parts: first, calling the prisoner to the bar by name; secondly, reading the indictment to him; and thirdly, asking him whether he be guilty or not of the offence charged. As soon as the indictment has been read over to the prisoner, the clerk of the arraigns or officer of the court demands of him:

“How say you, are you guilty or not guilty.”

If the prisoner pleads guilty, and it appears to the satisfaction of the judge that he rightly comprehends the effect of



**Note—Continued.**

his plea, his confession is recorded and sentence is forthwith passed, or he is removed from the bar to be again brought up for judgment. Archbold's Crim. Pleadings, 20th ed. 159. If the prisoner pleads "not guilty," his plea is recorded by the officer of the court, and the prisoner is said to have "put himself upon the country."

*Calling the jury.*

When a sufficient number of prisoners have pleaded and put themselves upon the country the clerk of arraigns addresses the jurors who have been summoned, thus :

"You good men, who are returned and impanelled to try the issue joined between our sovereign lady the Queen and the prisoners at the bar, answer to your names and save your fines," (*then calling the jurors by name.*)

The names are called over in the order in which the cards, on which the jurymen's names are written, are withdrawn from a box after being shaken together ; Criminal Code sec. 667.

The Clerk of the arraigns, before proceeding to call the jurors to the jury box, addresses the prisoners thus :

"Prisoners, these good men that you shall now hear called are the jurors who are to pass between our sovereign lady the Queen and you upon your respective trials, [*or, in a capital case, "upon your life and death"*]; if therefore you or any of you will challenge them or any of them you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard."

The direction of the Code (sub-sections 2 and 3 of sec. 667, Crim. Code of Canada) is that after such a number of persons whose names are on the jury panel returned, have answered to their names (on their names being called out in open court) as in the opinion of the court will "*probably be sufficient* to provide a full jury after allowing for challenges of jurors and directions to stand by" (sub-sec. 2), the officer shall "*then* proceed to swear the jury, each juror being called to swear in the order in which his name is so drawn, until, after

**Note—Continued.**

subtracting all challenges allowed and jurors directed to stand by, twelve jurors are sworn (sub-sec. 3).

It is, however, provided by sub-section 7 of sec. 667 of the Code that an omission to follow the directions contained in sec. 667 shall not affect the validity of the proceedings.

**Challenge of jurors.**

Challenges are of two kinds : (1) *To the array, i.e.*, when exception is taken to the whole number impanelled (Cr. Code 666); and (2) *To the polls, i.e.*, when individual jurymen are excepted against.

Challenges to the polls are either *peremptory*, or *for cause*. Peremptory challenges are those which are made without any reason assigned and which the court is bound to allow to the number limited by statute (Cr. Code 668).

On the demand of the Crown any juror may be directed to "stand by," the consideration of the challenge being postponed until it can be seen whether a full jury can be made without him. *Mansell v. R.*, 8 E. & B. 54, Dears. & B. 375. The Crown is not bound to show any cause of challenge until the panel has been gone through and exhausted, so that there are no more jurors in the panel whose attendance can be procured. *Mansell v. R.*, 8 E. & B. 54; Cr. Code 668. The Crown's right to have a juror "stand by" is additional to a power to challenge four jurors peremptorily.

A challenge to the polls for cause may be either *principal* or *for favor*. A *principal* challenge for cause is one based upon, (a) an objection to the qualification of the person to be juror, such as alienage, or that the juror's name does not appear in the panel, or (b) an objection on the ground of some presumed partiality such as would be a good ground for a principal challenge to the array in the case of the sheriff, *i.e.*, affinity to or employment by either party, or having an interest in the result of the trial; or where an actual partiality is shown to exist.

A challenge *for favor* is where, although the juror is not manifestly partial as to render him liable to a principal

**Note—Continued.**

challenge, there are, nevertheless, reasonable grounds for suspicion that he will act under some prejudice or undue influence ; as where he has been entertained in the house of the party, or has been arbitrator in the same matter, or where the juror and the party are fellow-servants, or where any other cause exists such as would constitute in the case of the sheriff a ground of " challenge to favor " to the whole panel Archbold's Crim. Pl. 175.

In the case of a ' principal challenge ' to the polls, on the ground that the juror's name does not appear on the panel the question raised by the challenge is tried by the presiding judge, (Cr. Code 668 (7) ). In the case of a ' challenge for favor,' it is left to the discretion of " triers " who are sworn and charged to try whether or not the juror challenge stands indifferent between the Queen and the accused (Cr. Code 668 (8) ); and the same process applies where the challenge is on the ground that the juror has been convicted of an offence and sentenced to imprisonment with hard labor or exceeding twelve months (sec. 668 (5) ), or is an alien (sec. 668 (8) ).

[HIGH COURT OF JUSTICE, ONTARIO.]

FORE ARMOUR, C.J., Q.B., FALCONBRIDGE AND STREET, JJ.

## THE QUEEN v. WOODYATT.

*Summary conviction—Enforcement after certiorari granted—  
Contempt of court—Magistrate's knowledge of certiorari—  
Service of writ on Clerk of the Peace.*

If the writ of certiorari issued to remove a summary conviction into the High Court of Justice was served only upon the Clerk of the Peace with whom the conviction was filed, and not upon the convicting magistrate, and the magistrate, having no knowledge that certiorari had been directed, thereafter enforced the conviction, he is not guilty of contempt of court in so doing.

ARGUED : November 22, 1895.

DECIDED : December 14, 1895.

On the 13th day of June, 1895, an order nisi was obtained on behalf of one Fleming, who was, on the 13th day of April, 1894, convicted by the defendant, the police magistrate of the City of Brantford, for an offence against the Liquor License Act, calling upon the defendant to show cause why he should not be attached for contempt in authorizing, sanctioning or permitting the enforcement of the said conviction.

It appeared from the material filed on obtaining the order nisi, that a writ of certiorari to remove the said conviction to this court was duly issued on the 6th day of June, 1894, directed to the defendant and to the Clerk of the Peace of the County of Brant; that such certiorari was served on the acting Clerk of the Peace on the 7th day of June, 1894; that it never was served on the defendant, and the only evidence of its having come to the knowledge of the defendant was the statement in an affidavit filed by Fleming and made by him, that "the said Woodyatt had full notice and knowledge of the granting of the order for the certiorari, and of the service of the writ of certiorari at or about the time of the taking place of said proceedings respectively."

TORONTO, November 22, 1895.

*Wilkes*, Q.C., showed cause and filed the affidavit of the defendant, stating, among other things, "that he had no knowledge whatever that a writ of certiorari had been issued in the Fleming case until some time after the said Fleming's arrest and payment of the fine and costs under the said conviction."

*McCullough* supported the order nisi.

TORONTO, December 14, 1895.

ARMOUR, C.J.Q.B.—

The writ of certiorari, although directed to the defendant, was never served upon him, and I do not think that in the absence of such service we would be warranted in granting an attachment against the defendant.

In *Rex v. Bottoms*, 1 East 299, an indictment was found at the Quarter Sessions of the Peace, and at the same sessions the attorney for the prosecutrix delivered to the Clerk of the Peace a writ of certiorari for removing the said indictment into the Court of King's Bench, which writ was handed up to the chairman and was seen by him and other magistrates on the Bench; the writ was addressed "To the Keepers of our Peace, etc." Lord Kenyon, C.J., said, at p. 302, "that if the certiorari were produced in court and came to their knowledge, it could not admit of an argument whether or not it should be obeyed. No doubt the court were bound to yield obedience to it, and all subsequent proceedings upon the matter were void. Here it was sworn that the writ was handed up to the Bench and seen by several of the magistrates, which is sufficient notice. And this court would not lay down rules for regulating the manner in which the writ should be delivered to the justices below."

It is clear that in this case Lord Kenyon thought that the writ of certiorari was well served upon "The Keepers of our Peace," to whom it was directed, by being delivered to the Clerk of the Peace during the sessions, and being handed by him to the chairman.

It would be going far beyond this decision to hold that in such a case as the present the defendant could be held guilty of contempt of a writ addressed to him, but never served upon him, upon the vague statement in an affidavit that he had full notice and knowledge of the service of the writ of certiorari upon the acting Clerk of the Peace at or about the time of its taking place without saying how or in what particular manner, or at what particular time, he acquired such notice or knowledge.

The defendant, however, explicitly denies any such notice or knowledge, and in this respect the affidavit of the applicant is fully answered.

The order nisi must, therefore, be discharged with costs.

FALCONBRIDGE and STREET, JJ., concurred.

*Attachment refused.*



## [COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE DUBUC, KILLAM AND BAIN, JJ., SITTING AS A COURT OF  
APPEAL FOR CROWN CASES RESERVED.

## THE QUEEN v. SAUNDERS.

*Dominion election law—Secrecy of ballot—Compulsory disclosure by witness at criminal trial.*

1. Notwithstanding sec. 71 of the Dominion Elections Act, a voter called as a witness in a trial on an indictment charging a criminal offence may be required to state for whom he voted.
2. The provision of sec. 71 applies only to election petitions or other legal proceedings questioning the election or return, and not to the prosecution of a deputy returning officer for fraudulently putting in a ballot box false ballot papers.
3. The answer of a witness stating for whom he voted is not secondary evidence because the vote was by mark upon a paper not produced upon which the candidates' names were printed, and on which there was or should be nothing to identify the ballot as that marked by the voter; and such evidence is admissible without production of the ballots.

ARGUED : May 11, 1897.

DECIDED : June 5, 1897.

At the Spring Assizes held at Portage la Prairie, before Taylor, C.J., George Saunders was charged on an indictment which alleged that he, being and acting as a deputy returning officer at an election held on the 23rd of June, 1896, for the electoral district of Macdonald, did unlawfully and fraudulently put into a ballot box divers papers purporting to be ballot papers, but to his knowledge not being ballot papers, and being other than the ballot papers which he was authorized by law to put into the ballot box. The jury found him guilty. During the trial George Phillips was called as a witness for the Crown, and deposed that he was a voter in the electoral district of Macdonald, and that at the election held on 23rd June, 1896, at the polling division at which Saunders was acting as deputy returning officer, he recorded his vote by marking the ballot paper which he received from Saunders and returning the same to him to be placed in the

ballot box. Counsel for the Crown then proposed to ask the witness to state for which of the candidates at the election he marked his ballot paper and voted. Counsel for Saunders objected to the question being asked, and to the witness being required or allowed to answer, on the ground that to allow such a question to be asked and answered was inconsistent with the secrecy of the ballot, contrary to the provisions of the Dominion Elections Act and contrary to public policy; also on the ground that, the ballot paper marked by the witness being itself the vote, any viva voce evidence given by the witness to shew how he marked his ballot paper and voted would be only secondary evidence. Notice to produce the ballot papers had been served upon the accused. Taylor, C.J., allowed the question to be asked and answered, stating he would reserve a case for the opinion of the Full Court. The objections above stated, and the Chief Justice's ruling thereon, were applicable to the evidence of eighteen of the witnesses called at the trial and examined on behalf of the Crown.

The questions stated by the Chief Justice for the opinion of the Full Court were as follows:

1. On the trial of an indictment such as that in this case, can a witness, a voter, be asked for whom he recorded his vote at the election, and be required or allowed to answer that question?
2. Is the answer given by the witness, a voter, stating for whom he recorded his vote, secondary evidence only and not admissible?

Without the evidence of the witnesses mentioned as to the candidate for whom they recorded their vote, there was no evidence to sustain the indictment. If, therefore, the evidence should not have been received, the conviction was to be quashed. The accused was released from custody on his giving bail to appear for judgment and sentence at the next assizes.

*C. P. Wilson*, for Saunders: The chief ground for passing the Ballot Act was to protect the voter from the influence



of parties on whom, in some way, he depended. As a matter of public policy, the secrecy of the ballot should not be violated : *Haldimand Election Case*, 15 Can. S.C.R. 495. In England, on the trial of an election petition, a witness may not be asked to what party he belongs : Leigh and Le Marchants' Election Law, 193 ; *North Durham Case*, 3 O'M. & H. 1 ; *Harwich Case*, 3 O'M. & H. 63. By section 49, certain ballots are to be marked in the presence of the agents for the candidates—who are required to take an oath not to disclose how same are marked. If a voter so marking his ballot was allowed to state how he voted, it would be an anomaly if the agents were not allowed to contradict him. Clearly on the ground of public policy, they would not be permitted to do so. This policy should also extend to the voter himself. The Crown will rely on *The Queen v. Beardsall*, 45 L. J. Mag. Cas. 158, 1 Q.B.D. 452, as shewing that, as a matter of policy, secrecy must give way to the policy of purity. That case, however, is decided upon the wording of an Act which makes provision for disclosing the manner of voting, while our Act provides for absolute secrecy. A further objection is that the evidence is only secondary. The voting consists of placing the mark on the ballot, and the marked ballot itself is therefore the best evidence.

*H. M. Howell*, Q.C., for the Crown : If by accident a scrutineer or a clerk knows how a voter has voted, the law has provided that these parties keep the secret. But the voter who knows best of all how he voted is not restricted from stating how he did vote. It is the privilege of the voter to say, or not, how he voted, and he is not restrained by the statute. In this case the purity of an election is a policy of the statute, a higher public policy than the secrecy of the ballot : *The Queen v. Cox*, 14 Q.B.D. 153 ; *Williams v. Quebrada R'y. Co.* [1895], 2 Ch. D. 751. The fact that by section 71 of The Dominion Elections Act, R.S.C. c. 8, Parliament has protected the voter from stating **how** he voted in trials of election petitions only, shews that if it had been the intention to make that applicable to other

cases, as criminal cases, Parliament would have done so in so many words. As to best or secondary evidence, that produced was the best evidence, not secondary. Suppose the ballots were produced, it could not be ascertained which of the ballots was the ballot of any particular voter. It is impossible to distinguish one ballot from another. We have given the best evidence, and therefore it is not secondary. We produced the ballots found in the box, and we gave notice to Saunders as deputy returning officer to produce the true ballots.

DUBUC, J.—

It is contended that section 71 of The Dominion Elections Act should govern the answer to the first question submitted. That section reads as follows :

“ No person who has voted at an election shall, in any legal proceeding questioning the election or return, be required to state for whom he voted.”

To interpret the language of this section in its strict literal sense, it would seem that a voter, in an election trial, could not be compelled, against his wish, to state for whom he voted ; but that, if he chooses to waive his right and volunteers to make the statement, he might be allowed to do so. It has, however, been held that, under the Act, the secrecy of the ballot is a matter of public policy, and that the evidence is not admissible, even if the voter is willing to give it.

In *Malcolm v. Parry*, L.R. 9 C.P. 618, Mr. Justice Brett said that “ the Judge cannot inquire into the question how the voter voted, for this would be contrary to the spirit of the Act.”

In the *North Durham Case*, 3 O'M. & H. 1, and in the *Harwich Case*, 3 O'M. & H. 61, it was held that a voter cannot even be asked to what party he belongs, except in cases where he holds himself out as belonging to one party.

In *The Queen v. Beardsall*, 1 Q.B.D. 452, also reported in 45 L.J.M.C. 157, Kelly, C.B., said : “ This case is clear.

The Legislature has no doubt provided that secrecy shall be preserved with respect to ballot papers, and all documents connected with what is now made a secret mode of election. But this secrecy is subject to a condition essential to the administration of justice and the prevention of fraud, forgery and other illegal acts affecting the purity and legality of elections." Lush, J., expressed himself as follows: "Mr. Ambrose's argument went to this, that secrecy was the only object of the Act of Parliament, but I hardly agree to that, as I think its object also was to secure purity of elections. Forgery, delivering forged papers and fraudulently putting them into the ballot box, are three offences, among others, to secure purity of election. Some of these offences could not be proved without opening the ballot papers."

In the *Haldimand Election Case*, 15 Can. S.C.R. 495, it was held that, under the provisions of section 71 of the Act, secrecy of the ballot is an absolute rule of public policy, and it cannot be waived.

The court has to give effect to this statutory enactment; but the provision has a restrictive qualification which must not be overlooked. It says that no person shall be required to state for whom he voted in any legal proceeding 'questioning the election or return,' and not in any legal proceeding whatsoever. If this point had been raised in the trial of an election petition, it would have to be held that the evidence was absolutely inadmissible. But in this case the evidence was given in a trial on an indictment charging a criminal offence. When the witness Phillips was asked to state for which of the candidates he marked his ballot paper and voted, objection was raised to the question by the counsel for the defence on the ground that such evidence would be inconsistent with the secrecy of the ballot, and contrary to public policy. The learned Chief Justice, before whom the case was tried, allowed the question to be asked and answered, and it does not appear that the witness was unwilling to answer the question. There is nothing in the Dominion Elections Act, or in any other statute, declaring that, in the

trial of a criminal offence, such a question cannot be asked and should not be answered.

I think, therefore, that the evidence was properly received, and that the first question submitted to the court should be answered in the affirmative.

As to the second question—viz.: Whether the answer of the witness stating for whom he recorded his vote was secondary evidence and not admissible—I think there can be no doubt that it must be considered as primary and not secondary evidence. In an election under the Dominion Elections Act, neither the ballot paper nor any other document or paper would shew how an elector has voted. There is no other mode of ascertaining the fact than the evidence of the voter himself. Such evidence has, therefore, in my opinion, to be held primary evidence and admissible, and the conviction should be affirmed.

KILLAM, J.—

I am of opinion that evidence of voters to shew how they voted could properly be received. It is not the voters who object to disclosing this, and the Act imposes upon them no obligation to keep it secret. It is true that in the *Haldimand Election Case*, 15 Can. S.C.R. 495, Strong and Taschereau, JJ. expressed opinions upon the general policy of the Act which, at first sight, may seem opposed to this view, but they were dealing with an election petition and the construction of the clause, forbidding that on such a proceeding a person who has voted shall be required to state how he has voted. The circumstance that the prohibition is limited to proceedings questioning the election or return is some indication that Parliament did not intend it to extend to other proceedings. It seems unnecessary to refer in detail to the English and Irish cases cited, which my learned brother has already reviewed.

I am also of opinion that the other objection to the giving of the evidence should be overruled. The general rule is that the best evidence obtainable must be given, and,

naturally, the best evidence of the contents of a written instrument—and a ballot paper, with the marks upon it, is certainly a written instrument—is the original instrument. But the rule requiring its production and identification yields to circumstances, as in the well-known cases of lost documents, documents which the opposite party will not produce, inscriptions or documents affixed to walls, documents held by a solicitor claiming a lien upon them, public documents in official custody, documents held by parties abroad who refuse to part with them, &c.

Here it was the duty of the accused to put the ballot papers in the ballot box without marks which can identify them. If he has done so, they cannot be identified. The onus of proof that he did not is upon the Crown, and it is for the very purpose of proving this that the evidence is offered. Notice to him to produce would be absurd, as the accused could not be expected to criminate himself by their production.

I think the answers to the questions should be that the evidence was admissible, and I concur in the judgment affirming the conviction.

BAIN, J.—

I think the first question should be answered in the affirmative.

There is no statutory provision forbidding a witness in a criminal trial from being asked and telling for whom he voted at an election; and I cannot agree with the contention that was urged on behalf of the accused, that the court should exclude evidence of this kind on the ground of public policy. It is true that one very important object the Elections Act has in view is to secure secrecy of voting; but, as was pointed out in *The Queen v. Beardsall*, 1 Q.B.D. 452, purity of elections is an object of the Act as well as secrecy, and secrecy is subject, and must yield when necessary, to considerations essential to the due administration of justice and the prevention of fraud and other illegal acts affecting



the purity and legality of elections. With the object of ensuring purity in elections, Parliament has declared the acts for which the accused was indicted, and the other acts mentioned in section 100, to be criminal offences ; and it is manifest that, unless witnesses can be asked for whom they voted, it will be impossible in many cases to prove the commission of these offences. This fact could hardly have escaped the consideration of Parliament when it was declaring the offences defined in section 100 ; and when we find the express provision that, in proceedings under election petitions, witnesses are not to be required to state for whom they voted, and no similar prohibition in the case of prosecutions for offences under the Act, I infer that Parliament did not intend that in these criminal trials witnesses were not to be required to state for whom they voted.

With reference to the second question reserved, I do not think the answer of a witness stating for whom he voted can be held to be inadmissible as secondary evidence of that fact. Under the English Ballot Act, the ballot papers and counterfoils have the same numbers ; and as the number of a voter in the register must be marked on the counterfoil when a ballot paper is handed to the voter, a comparison of the ballot paper, counterfoil and register, shows who was the voter that marked the ballot paper. But under our Act there should be nothing whatever on the ballot paper that would shew or in any way indicate who the individual voter was that marked it. The reason of the rule against the admission of secondary evidence is, that the secondary evidence itself shews that better and more direct evidence is in existence ; but in this case, as a matter of fact, there is no better or more direct evidence in existence. The production of a ballot paper tells nothing as to the fact who it was that marked it.

*Conviction affirmed.*

## [SUPREME COURT OF NEW BRUNSWICK.]

**Ex parte DONOVAN.**

*Summary conviction—Service of summons—Leaving at usual place of abode—Absence of accused from Canada—Jurisdiction of magistrate—Cr. Code 562, 853.*

1. Service of a summons to appear before a magistrate to answer a charge of having committed an offence punishable by summary conviction is not validly made although left with the defendant's wife at his usual place of abode (Cr. Code 562), if the defendant was then absent from Canada and remained away until after the hearing.
2. The magistrate in such a case acquires no jurisdiction over the person of the defendant, and a conviction made in the defendant's absence upon such service will be quashed.

ARGUED : February 3, 1894.

DECIDED : February 3, 1894.

On the first day of Michaelmas Term, 1893, on motion of *J. A. VanWart*, Q.C., a rule nisi was obtained for a certiorari to remove a conviction of the applicant, John Donovan, had before Peter Girdwood, Commissioner of the Parish of Canterbury Civil Court, for selling intoxicating liquors contrary to the provisions of the second part of the Canada Temperance Act. The objection to the conviction was, that the magistrate acted without jurisdiction, for the reason that the service of the summons was not sufficient. On the hearing before the Commissioner, it was shown that the summons had been served on the wife of the defendant at his usual place of abode in the parish of Canterbury. It appeared by the affidavit, on which the rule was obtained, that at the time of the service the defendant was in the State of Maine, and that he did not return to the Province until after the hearing.

FREDERICTON, N.B., February 3, 1894.

*McCready* showed cause. Section 562 of the Criminal Code provides that service may be effected by leaving the summons for the defendant, with some inmate at his last or most usual place of abode. The sufficiency of the service is

a question for the magistrate to decide, and the Court will not interfere with his finding, unless it appears that there was in fact no service. Paley on Convictions (6th ed.) 93; Criminal Code, sec. 853. The magistrate had evidence before him that the summons was served on the defendant, by leaving it with his wife at his usual place of residence. This evidence gave the magistrate jurisdiction.

*J. A. VanWart*, Q.C., was not called upon to support the rule.

*Per Curiam* (SIR JOHN C. ALLAN, C.J., taking no part). We think that the magistrate could not acquire any jurisdiction over the person of the defendant while he was out of the Province, and therefore the service was void.

*Rule absolute.*

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[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., GRAHAM, E. J., AND MEAGHER AND HENRY, JJ.

THE QUEEN v. WILLIAM McDONALD.

*Magistrate—Summary conviction—Issue of summons—Information need not be sworn unless warrant to issue—Cr. Code 558, 559, 843, 845.*

1. A summons may be issued upon an information before a Justice of the Peace for an offence punishable on summary conviction, although the information has not been sworn (Cr. Code 843, 845 (2)) ; but before a warrant can be issued to compel the attendance of the accused, there must be an information in writing and under oath (Cr. Code 558, 843).

DECIDED : May 18, 1896.

Motion on behalf of defendant for a certiorari, referred to the court by Ritchie, J., in Chambers.

An information was laid against the defendant charging him with an offence under the Canada Temperance Act of



which he was afterwards convicted. The justice issued his summons upon the information, but the defendant did not take part in the trial further than to raise the objection that the proceedings were defective, because the information was not sworn to.

*E. M. McDonald* in support of motion. *Nem. con.*

HALIFAX, May 18, 1896.

The judgment of the court was delivered by

MEAGHER, J.—

The sole question for determination is whether or not, in a case like the present, which relates to an offence punishable on summary conviction, it is necessary that the summons should be grounded on a sworn information. In *Baxter v. Carew*, 3 B. & C. 649, it was ruled “that magistrates were not obliged to take an information upon oath when the statute did not require they should do so.”

Parke, B., in *Reg. v. Millard*, 17 Jur. 400, said :—“No magistrate can proceed without an information, but, unless the statute requires that the information should be in writing, or on oath, it need not be so,” and Hawkins, J., in *Reg. v. Hughes*, 4 Q.B.D. 615, said :

“If a mere summons is required, no writing or oath is necessary. A bare verbal information is sufficient. If a warrant is required, then, and for that purpose only, an oath substantiating the information is requisite, not only by the provisions in Jervis’ Act, so often referred to, but by the common law, of which it always was a doctrine, that a warrant which deprives a man of liberty ought not to issue without oath of the truth of the information.”

If the statute under which this proceeding was taken, does not require the information to be sworn to, it is abundantly clear, from the foregoing authorities, that it need not be. Some light may be thrown upon the matter by a reference to the provisions in force on this subject prior to the enactment of the Criminal Code.

Sec. 13, of chap. 178, R.S.C., authorized the justice upon an information being laid before him, to issue his summons requiring the accused party to appear, etc.

Sec. 18 enabled the justice, if he thought fit, upon oath or affirmation being made before him substantiating the matter of the information to his satisfaction, to issue a warrant in the first instance, instead of issuing a summons.

If the party summoned did not appear, the justice was empowered by s. 17, upon proof of the service of the summons, and the matter of the information being substantiated to his satisfaction, to issue a warrant to compel the attendance of the accused before him.

Sec. 24 provided, amongst other things, that every information for any offence or act punishable on summary conviction, might, unless it was by that Act or by some particular Act or law otherwise provided, be made or laid without any oath or affirmation as to its truth.

Sec. 25 required, when the justice issued his warrant in the first instance, that the matter of the information should be substantiated by the oath or affirmation of the informant, or some other witness on his behalf, before the warrant issued.

The provisions of chap. 178, to which I have made reference, certainly did not require a sworn information to be laid before a justice, in order to enable him to issue a summons for an offence punishable on summary conviction.

It therefore, appears to me, there being no necessity, prior to the enactment of the Code, for a sworn information to lead a summons for an offence punishable on summary conviction, that the burden is cast upon the defendant of showing with a reasonable degree of clearness, that the radical change he contends for has been made by the provisions of the Code.

Sec. 558 (Criminal Code), enacts that, "Any one who upon reasonable or probable grounds, believes that any person has committed an indictable offence against this Act, may make complaint or lay an information in writing and under oath

before any magistrate or justice of the peace having jurisdiction to issue a warrant or summons against such accused person in respect of such offence."

Sec. 559.—Upon receiving any such complaint or information, the justice shall hear and consider the allegations of the complainant, and if of opinion that a case for so doing is made out, he shall issue a summons or warrant, as the case may be, in manner hereinafter mentioned, and such justice shall not refuse to issue such summons or warrant only because the alleged offence is one for which an offender may be arrested without warrant.

Sec. 843.—The provisions of parts XLIV. and XLV., of this Act, relating to compelling the appearance of the accused before the justice receiving an information under s. 558, and the provisions respecting the attendance of witnesses on a preliminary enquiry, and the taking of evidence thereon, shall, so far as the same are applicable, except as varied by sections immediately following, apply to any hearing under the provisions of this part.

The concluding part of this section requires that, whenever a warrant is issued in the first instance against a party charged with an offence punishable under the provisions of this part, the justice shall furnish a copy which shall be served at the time of the arrest.

Sub-sec. 2, of s. 845 provides that: "Every complaint upon which a justice is authorized by law to make an order and every information for any offence or act punishable on summary conviction may, unless it is herein, or by some particular Act or law otherwise provided, be made, or heard, without any oath or affirmation as to the truth thereof."

Sec. 558 above quoted is contained in part XLIV.

There is no specific provision in the Code requiring sworn information to be laid, before the justice can issue a summons in a case like that before us, but it is claimed that s. 843 has the effect of bringing those parts of XLIV. and XLV., which relate to compelling the appearance of the accused and receiving an information, etc., into operation, and

making them applicable to summonses, and, therefore, there is no distinction between the granting of a summons and a warrant in the first instance, so far as the necessity for a sworn information to precede them is concerned. If such was the intention of parliament, it has adopted a far fetched method of accomplishing what might have been done directly, and in a very few words.

If s. 843 was intended to have the wide scope now insisted on, it would make a very substantial change in the law, and that too without any necessity therefor, so far as I can perceive. Besides that, it would cover every conceivable case arising under that part of the Code in which that section appears, and would extend not only to offences punishable on summary conviction, but also to complaints upon which a justice is empowered to make an order. Two things militate against that contention. They are (1) that the operation of s. 843, while applicable to hearings before justices under the provisions of the part in which it occurs, is limited by the words therein :—"except as varied by the sections immediately following" it ; and (2) that in the sections which immediately follow 843, provision is made declaring (sec. 845) that it shall not be necessary that any complaint upon which a justice may make an order for the payment of money or otherwise, shall be in writing, unless it is required by some particular Act or law upon which the complaint is founded, and by sub-sec. 2 of 845, already quoted, which provides that the information for an offence or act punishable by summary conviction, may be made without oath of its truth unless it is therein, that is in the Code, or by some particular Act or law, otherwise provided. These provisions are as general as they can well be. If it had been otherwise provided in the Code with respect to a summons, there was no occasion whatever for sub-sec. 2, so far as it relates to matters capable of being dealt with on summary conviction.

In the face of sub-sec. 2, it would require very clear words to give the statute, that is secs. 558 and 843, read

together, the scope and effect contended for on behalf of the defendant. The exception expressed in 843 can be safely relied on as a guide to show that that section was not intended to control in those matters in respect to which a different provision or provisions were made by the sections which follow it. If the exception referred to did not exist in s. 843, it might be that we would be compelled to read s. 843 as the controlling section. But, even then, I think it could fairly be read to extend only to process, "compelling" the appearance of the accused, which, I take it, has reference to compulsory process only, and would therefore only embrace warrants.

The motion should be refused.

*Certiorari refused.*

## [COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE THE HONOURABLE MR. JUSTICE WÜRTELE.

## THE QUEEN V. RIENDEAU.

*Rape—Evidence of complaint by prosecutrix—Admissibility of details of complaint—Lapse of time between offence and complaint thereof—Proof of civil action for damages—Extortion—Cr. Code 266.*

Upon the trial of a charge of rape the whole statement made by the woman by way of complaint shortly after the alleged offence, including the name of the party complained against and the other details of the complaint, is admissible in evidence as proof of the consistency of her conduct and as confirmatory of her testimony regarding the offence, but not as independent or substantive evidence to prove the truth of the charge.

Whether or not the complaint was made within a time sufficiently short after the commission of the offence as to admit evidence of the particulars of the complaint, is a question to be decided by the court under the circumstances of the particular case; but it is nevertheless the province of the jury to take into consideration the time which intervened, in weighing the probability of its truth.

The lapse of seven days between the date of the offence and the time of making complaint thereof was held insufficient under the circumstances to exclude testimony of the particulars of the complaint.

Proof on behalf of the defence that the injured party or her parents had instituted civil proceedings to recover damages arising from the commission of the alleged rape is properly excluded upon the criminal trial as irrelevant, unless other facts have been disclosed in evidence which tend to show an intent to thereby wrongfully extort money from the accused.

The failure of the trial judge, *ex mero motu* to direct the jury to give to the prisoner the benefit of any reasonable doubt, is not a good ground for interfering with the verdict in a case where the evidence does not point to any reduced or lesser offence<sup>a</sup>

MONTREAL, January 3, 1900.

WÜRTELE, J.—

The prisoner, Azarie Riendeau, was indicted and tried for having, on the 15th August, 1899, at the City of Montreal, committed rape upon Albina Soulière, a girl of the age of



eighteen years, and was found guilty on the 7th December, 1899.

Marie Louise Paré, the mother of the injured party, was the prosecutrix, and it was on her information that the accused was arrested. The injured party, Albina Soulière, was the first witness examined and she proved that she had been ravished by the prisoner without her consent and by force on the 8th and not on the 15th day of August, 1899. Her evidence was corroborated by her mother, Marie Louise Paré, to whom the injured party had made a complaint on or about the 15th August, 1899, about eight days after the commission of the offence; and she gave in evidence, notwithstanding the objection made by the prisoner's counsel, which was overruled, the full particulars of the complaint, including the fact that her daughter had stated that the act complained of was against her will. The injured party's evidence was also substantiated by the testimony of Arthur Olivier, with whom the prisoner boarded at the time when he committed the offence, and to whom he mentioned its commission and also gave details and circumstances which agreed with the statement made by the injured party when she complained to her mother and with what she related when she gave her evidence.

When evidence was being taken for the defence, counsel for the prisoner wanted to prove that the injured party, through her tutor, had instituted an action against the father of the prisoner, who was also a minor, for the sum of \$5,000 for damages arising from the commission of the rape, and that the injured party's mother, Marie Louise Paré, had also brought a similar action for \$500, but no preliminary proof had been made to the effect that either the injured party or her mother had ever stated or even insinuated that the prisoner was innocent and also to the effect that they were attempting to extort money. As presiding judge, I refused under these circumstances to allow the production of the records of the two civil suits in the Superior Court and to permit evidence to be adduced with respect to the two civil actions.

When, also, taking evidence for the defence, counsel for the prisoner endeavored to prove by Moise Jolivet and his wife Olivine Payette that Albina Soulière on the 15th August, 1899, had met the prisoner in the yard of the house in which she lived and had kissed him, and that her mother had ordered her to leave him and to retire into the house and that she had then struck her mother with a stick and had bitten her arm. I allowed evidence to be given respecting the injured party's conduct towards the prisoner but I refused to allow any evidence to be given respecting the assault which it was pretended had been committed by her on her mother, as not being relevant to the issue. As a matter of fact Albina Soulière and her mother denied that any improper familiarities had taken place between the prisoner and her after the offence and that she had ever assaulted her mother; Olivine Payette swore that she had never seen Albina Soulière and the prisoner together after the 8th August, 1899; and Moise Jolivet stated that after that date he had seen them on one occasion seated near one another on one of the galleries and that on another occasion he had seen the prisoner's head on Albina Soulière's shoulder, but he damaged his own character in giving this evidence as he had to admit that he was a drunkard and that he had been in jail seven or eight times. The only witnesses besides Albina Soulière and her mother who were questioned about the pretended wrangle between them and about the assault alleged to have been committed by the former on the latter, were Olivine Payette and her husband Moise Jolivet, and as no proof had been made that Marie Louise Paré knew that her daughter had ever spoken to the prisoner or had even met him after the 8th August, 1899, and that she positively denied under oath any such knowledge, the question was disallowed as irrelevant.

In charging the jury, I did not allude to the question of doubt, as I considered that the evidence in the case could not raise any doubt whatever.

The prisoner's counsel has moved for a reserved case for



the opinion of the Court of Appeal on four questions of law. These questions are :—

(1.) Whether the court did not erroneously and illegally allow the injured party's mother, Marie Louise Paré, to testify as to the terms of the complaint made to her by her daughter and to name the party whom she accused, and as to whether the complaint had not been made too long after the commission of the offence to be admitted as corroborative evidence ?

(2.) Whether evidence should not have been allowed of the civil suits for damages in consequence of the defilement of the injured party, which had been instituted by her tutor on her behalf and by her mother ?

(3.) Whether the court did not erroneously and illegally refuse to allow evidence to be given respecting a wrangle between Albina Soulière and her mother about the prisoner, and respecting an assault alleged to have been committed by the former on the latter ?

(4.) Whether the court should not have drawn the attention of the jury to the question of doubt and have instructed them on that point ?

The motion for a reserved case was fully argued and the decision was reserved. Having given the motion due consideration, I will now dispose of it. I will begin by taking up the first question of law which has been raised on behalf of the prisoner, whether the particulars of the complaint and the name of the person accused should have been given in evidence and whether the complaint was made too late to be admitted as corroborative evidence ?

This question of law can be divided into three subdivisions :—First, as to the particulars of the complaint ; second, as to the name of the person accused ; and, third, as to the time at which the complaint should be made. I will consider these three subdivisions in their order.

Until a recent period the practice in cases of rape was to allow proof to be admitted that a complaint had been made by the injured party as corroborative evidence and not as substantive evidence of the commission of the crime, but the

usage which prevailed did not allow the particulars of the complaint to be given nor the name of the accused person to be mentioned. But for a long time doubts had been expressed as to the correctness of this practice or rule, and it had been suggested that it would be more rational to admit evidence of the full particulars of the complaint and of the name of the offender, as the accordance of the particulars of the complaint with the circumstances of the rape which might be mentioned by the injured party in giving her evidence would be a proper test of the accuracy of her recollection and of her veracity, while, on the other hand, any contradiction between the two relations would certainly raise a reasonable doubt in the minds of the jurors of the guilt of the accused person, if not a strong presumption of his innocence.

In 1839, Baron Parke, in the case of *The Queen v. Walker*, 2 M. & Rob. 212, said: "The sense of the thing certainly is that the jury should, in the first instance, know the nature of the complaint made by the prosecutrix and all that she then said. But, for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct towards her." Then, in 1877, Mr. Justice Bramwell, in the case of *The Queen v. Wood*, 14 Cox C.C. 46, said: "I do not see why you should not give in evidence all she said when she did so complain, leaving it to the jury to judge of the value of such evidence."

Taylor, in his work on Evidence, after stating that the particulars of a complaint could not be disclosed by witnesses for the Crown, either as original or as confirmatory evidence, and that the details could only be elicited by the prisoner's counsel on cross-examination, in sec. 581, adds: "It is difficult to see upon what principle this rule is founded where the complaint is offered as confirmatory evidence, because, if witnesses were permitted to relate all that the prosecutrix had said in making her original complaint, such evidence would furnish the best test of the accuracy of her recollection when she was sworn to describe the same circumstances at the trial."

Gradually, the practice veered towards the propriety of allowing the particulars of the complaint and the name of the accused to be given in evidence by the person to whom the complaint had been made, and now the usage is that the fact that the injured party made a complaint and the particulars of the complaint are admissible as evidence in chief for the prosecution, to confirm her testimony and disprove consent. To corroborate this statement of the present rule, I refer to Phipson on the Law of Evidence, 2nd edition (1898), pages 103 and 160 ; and I may add, using the words of Stephen in his Digest of the Law of Evidence (edition 1899, page 167), that " this practice is certainly in accordance with common sense."

The practice of Mr. Justice Wills, Baron Parke, Lord Bramwell, Lord Justice Smith, Mr. Justice Cave, and also Sir James Fitzjames Stephen, for many years before 1896, was to admit the terms of the complaint as part of the evidence for the prosecution. Then, in 1896, this practice was followed by Sir Henry Hawkins in the case of *The Queen v. Lillyman* (1896), 2 Q.B. 167, where the defendant unlawfully attempted to have carnal knowledge of a girl of an age which rendered her consent immaterial, and who, in giving her evidence, had, notwithstanding that fact, asserted that she had not consented to the attempt. Evidence was admitted of the terms of the complaint which she had made to her mistress. The defendant was convicted, but a case was reserved on the question whether this evidence was admissible, and the Court for Crown Cases Reserved, composed of the Chief Justice Lord Russell, Baron Pollock, and Justices Hawkins, Cave and Wills, affirmed the conviction. In delivering the judgment of the court, Sir Henry Hawkins stated that, after careful consideration, they had arrived at the conclusion that they were bound by no authority to support the existing usage of limiting evidence of the complaint to the bare fact that a complaint had been made, and that reason and good sense were against their doing so; and he indicated the grounds of the decision which allowed the particulars of the complaint to be given in evidence

on the part of the prosecution and the extent of such evidence in the two following passages :—

“ The complaint is clearly not admissible as evidence of the facts complained of. Those facts must, therefore, be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as being inconsistent with her consent to that of which she complains.”

“ The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness box negating her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her.”

Although in these passages stress is laid upon the fact that the terms of a complaint were admissible as evidence of a want of consent by the injured party, as, in the case under discussion, the consent of the girl was immaterial and was not in issue, it is manifest that, under the ruling contained in the judgment, all the details of the complaint should be admissible as a test of the credibility which ought to be given to all the relevant parts of her testimony ; and this, in fact, was the conclusion and ruling of the court, as given by Sir Henry Hawkins in his concluding words: “ In the result, our judgment is that the whole statement of a woman containing her alleged complaint should, so far as it relates to the charge against the accused, be submitted to the jury as a part of the case for the prosecution.” Later in the same year (1896) the Recorder of London, the Right Honorable Sir Charles Hall, held, in the case of *The Queen v. Folley*, 60 J.P., 569, where there was no question of consent, that the principle laid down in the case of *The Queen v. Lillyman*

applied to all cases, and that it was not restricted only to cases where a woman has made a statement as to her want of consent. Since the decision in *Lillyman's Case*, the details or particulars of complaints have been admitted generally in England, and especially on the Northern Circuit and at the Old Bailey, in cases of rape and similar offences upon females, not to prove and substantiate the charge, but to confirm or corroborate the injured party's testimony; and this practice may be said to be now the established rule of evidence.

In support of this statement on my part, I refer to Phipson on the Law of Evidence at the pages I have already mentioned, and to the Edition of 1899 of Stephen's Digest from page 167 to page 170. I may quote from page 12 of this last-mentioned book the following paragraph, which lays down the rule in plain language: "The question is whether A was ravished. The fact that, shortly after the alleged rape, she made a complaint relating to the crime, and the terms of the complaint and the circumstances under which it was made, are relevant."

Mr. Justice Taschereau, of the Supreme Court of Canada, is in accord with this practice and rule of evidence. At page 278 of his commentary on the Criminal Code, he says: "When a man is charged with rape, all that the woman said to other persons in his absence shortly after the alleged offence is admissible in evidence."

I am of opinion that the practice which now prevails is to admit and receive evidence of the particulars or details of a complaint made by a woman upon whom a rape is alleged to have been committed, not as independent or substantive evidence to prove the truth of the charge, but as corroborative evidence to confirm her testimony, and in my ruling in this case I followed the jurisprudence which now governs.

The next subdivision of the first question of law is as to the naming of the person whom the injured party accused. The prisoner claims that Albina Soulière's mother was

allowed, while giving her evidence of the particulars of the complaint, to mention his name as that of the person who was accused of having committed the rape. But the name of the person accused was one of the details and particulars of the complaint, and under the rule which now prevails it was therefore admissible for the witness to mention it in giving her evidence.

The third and last complaint made by the prisoner in connection with the first question of law submitted by him is that the complaint was made too late. It is true that a complaint should be made while the injury is still recent, yet the lapse of time between the commission of the offence and the making of the complaint is not the test of the admissibility of such evidence, but is only matter to be considered by the jury in weighing it (19 American & English Encyclopædia of Law, verbo "Rape," page 961). There can be no iron rule as to the delay within which a disclosure should be made. The law expects and requires that it should be prompt, but there is and can be no particular time specified, and there is no settled rule as to how recent the complaint should be. The court decides whether, under the circumstances of the case, the complaint has been made within a sufficiently recent time, and, if that is so, the fact that a complaint was made and its terms are admissible in evidence, but the jury may and should weigh the time which elapsed before the complaint was made when considering the probability of its truth (1 Greenleaf on Evidence, sec. 102).

In the present case the complaint was made within a week of the commission of the rape, and the injured party gave as her reason for not making it sooner that she was hindered by bashfulness and a feeling of shame. I considered that the reason given for not having made the disclosure sooner was a very natural one, and that under all the circumstances of the case it was made in a sufficiently recent time to be admissible in evidence. I therefore allowed the fact that a complaint had been made by the injured party to her mother and the particulars and details of the complaint to be



proved, but I left the consideration of the probability of its truth to the jury.

I am of opinion that the points raised in the first question of law submitted by the prisoner's counsel are unfounded, and that they should not be reserved.

I will now consider the second question of law raised in the motion for a reserved case—whether evidence should not have been allowed of the institution of the actions of damages against the father of the prisoner, who is a minor.

The fact that a criminal prosecution had been taken against the prisoner did not deprive either Albina Soulière or her mother of any civil recourse they might have for the damages which they might suffer from the rape which had been committed by the prisoner on Albina Soulière, and the mere fact that such suits had been taken could help neither the prosecution nor the defence, and was therefore irrelevant. If, however, it had been alleged and proved that Albina Soulière and her mother had ever stated or even let it be inferred that the prisoner was innocent of the accusation brought against him, and that they appeared to be desirous of extorting money from him, then the fact that suits had been instituted would have been corroborative evidence. But no such foundation was laid, and the naked fact that suits for damages had been brought and were pending was therefore irrelevant, and I refused to allow it to be proved. That fact alone, however, could not affect the positive evidence which had been adduced of the rape, and consequently no substantial wrong or miscarriage was or could be occasioned by the rejection of this evidence.

I am of opinion that the objection raised by the second question submitted by the motion for a reserved case is unfounded, and that it cannot be reserved.

The third question of law raised by the prisoner's counsel is:—whether evidence should not have been allowed to prove that Albina Soulière had had a wrangle with her mother about the prisoner, and that she had struck her mother with

a stick and had bitten her arm after the date on which the rape had been committed, and also to prove that improper familiarities had taken place between the injured party and the prisoner after the rape.

Albine Soulière and her mother both denied these allegations. Olivine Payette and Moise Jolivet were the only other witnesses who were questioned with reference to the alleged wrangle and to the pretended assault, and, as there was no proof that the prosecutrix, Marie Louise Paré, knew that her daughter had ever seen the prisoner and had ever spoken to him after the commission of the rape, and that she had positively denied under oath all knowledge of any such circumstances, the facts that a wrangle had taken place between her and her daughter and that an assault had been committed on her by her daughter were altogether irrelevant to the issue, and proof respecting them was therefore not allowed to be made. Whether there had been a wrangle and an assault or not, could not affect the positive evidence of the commission of the rape.

The subsequent conduct of the parties concerned in a crime, both that of the offender and the injured party, may have an important bearing in the deliberation of the jury and in the decision of the verdict, and evidence of such subsequent conduct is therefore relevant and admissible. And so also in many cases is the conduct of the parties before and at the time of the offence with which the defendant is charged. Although the prisoner's counsel in the motion for a reserved case complains that he was not allowed to prove the conduct of Albina Soulière after the 8th August, 1899, such was not really the case; no hindrance was made to the proof which was offered not only with respect to her conduct with reference to the prisoner and likewise generally after the rape had been committed, but also before and at the time of the rape. The only evidence of Albina Soulière's conduct which was not allowed was that which referred to the alleged wrangle and assault, which, as I have already stated, I considered to be irrelevant and therefore inadmissible. I may add that in my charge I drew the attention of the jury to the conduct of the



injured party, in order that it should be considered and weighed by them.

I am of opinion that the objections raised in the third question of law submitted in the motion are unfounded, and that the question should not be reserved.

I have now reached the last question of law submitted in the motion :—that I should have instructed the jury, if any reasonable doubt existed in their minds, that they should give the benefit of the doubt to the prisoner.

It seemed to me that on the evidence which had been adduced for the prosecution and for the defence no reasonable doubt could possibly arise in the minds of the jurymen ; if they believed and accepted the evidence of Albina Soulière, of her mother, and of Arthur Olivier, then the prisoner was guilty, but if they disbelieved and rejected their testimony, then the prisoner was innocent. There could be no medium or middle term, and no doubt could exist.

I therefore did not instruct the jury to give the benefit of a possible doubt to the prisoner, and to refrain from doing so was not and cannot be construed to be a misdirection. This last direction is, therefore, untenable, and cannot be the subject of a reserved case.

All the reasons given for a reserved case are unfounded, and, as I have no doubt in my mind as to the legality of all the proceedings at the trial, I should not and cannot reserve a case for the opinion of the Court of Appeal. The motion for a reserved case is therefore dismissed.

*Motion dismissed.*

*Desmarais, Q.C., Crown Prosecutor.*

*Chas. A. Wilson, for the prisoner.*

**Note:** *Rape—Complaint by prosecutrix—Time of, as affecting admissibility of evidence.*

This subject is discussed in the case of *The Queen v. Graham* (1899), 3 Can. Crim. Cas. 22, *ante* ; see also Note at pages 26-28, *ante*.

**Note—Continued.**

The circumstances in a very recent case in England, *R. v. Ingrey*, 64 J.P. 106, before Lord Russell, C.J., at the Bedford Assizes, (February 3, 1900) disclosed a much stronger case for admitting the evidence of the complaint than does the *Riendeau Case*, or the case of *The Queen v. Graham*, reported *ante* page 22.

In the *Ingrey Case* the prisoner was charged with having committed rape upon his 15 year old daughter. The girl had been living out at service but was at home temporarily before going to a new place. The girl's mother lived with the prisoner but not upon friendly terms, and kept a stall in a market ; and the girl called to see her mother there on her way to the railway depot after the alleged offence was committed but in the afternoon of the same day (a Saturday). Her mother being busy with customers at the market, the girl had no opportunity for private conversation with her but bade her good-bye and was told to write on the following Tuesday. The girl wrote on the Tuesday and also on Wednesday, and the prosecution, relying upon *R. v. Lillyman*, (1896) 2 Q.B. 167, 60 J.P. 536, desired to put these letters in evidence, as showing the nature of a complaint made within a reasonable time after the offence was committed. Lord Russell, however, thought it would be better not to put them in.

In answer to the prisoner, the girl said she went to tea with an aunt of hers on the Saturday evening, but made no complaint to her. She had had three places in service, and he had scolded her for having so many.

The prisoner, who was examined on his own behalf, denied that there was any truth in his daughter's story—it was an absolute invention. Her chief reason for making the charge, he was sure, was that he had scolded her about leaving her places, and that he and his wife were unfriendly and the girl took her mother's part.

Lord Russell in summing up the evidence, observed that he was on the whole of opinion that he was right in saying the letters referred to should not be pressed by the prosecution.

**Note—Continued.**

The law was that in cases of this kind when a complaint is made within a reasonable time that statement could be given in evidence. It must be made within "a reasonable time," and what was "a reasonable time" was a question for the Court, for upon it depended the admissibility or non-admissibility of the evidence. Though not entirely confident that he was right—for it should be remembered that the girl was told not to write until the Tuesday—he thought on the whole it was the safer and better course not to put the letters in evidence.

The jury found the prisoner guilty of an indecent assault and he was sentenced to 15 months' imprisonment. (64 J.P. 106.)

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**[COURT OF APPEAL FOR ONTARIO.]**

BEFORE SIR GEORGE BURTON, CHIEF JUSTICE OF ONTARIO, AND  
OSLER, MACLENNAN, MOSS AND LISTER,  
JUSTICES OF APPEAL.

**THE QUEEN v. CUSHING.**

*Jurisdiction — Offence under provincial statute — Municipal law — Appeal from order of a superior court quashing summary conviction—Motion to quash appeal.*

1. Except where specially authorized by statute, an appeal does not lie in Ontario to the Court of Appeal from an order of the High Court of Justice quashing a summary conviction made under a provincial statute.

ARGUED: May 11, 1899.

DECIDED: May 11, 1899.

Appeal by the private prosecutor from the judgment of the High Court of Justice quashing a conviction by the police magistrate of the City of Hamilton for breach of a by-law of that municipality regulating the sale of meat.

A motion to quash the appeal on the ground of want of

jurisdiction and a motion for leave to appeal if leave were deemed necessary were enlarged from Chambers into Court, and came on to be heard with the appeal.

*Mackelcan*, Q.C., for the appellant.

*W. Nesbitt*, and *J. G. Gauld*, for the respondent.

TORONTO, May 11, 1899.

The judgment of the Court was delivered by

OSLER, J.A.—

For many years before the Judicature Act of 1881, 44 Vict. ch. 5 (Ont.), the Court of Appeal was a Court of Record with appellate jurisdiction in civil and criminal cases, and an appeal lay thereto from every judgment of the Superior Courts in certain specified cases, but in no others, unless the judgment appeared of record: C.S.U.C. ch. 13; R.S.O. (1887) ch. 38. No appeal lay thereto from the judgment of either of the Superior Courts of law quashing a conviction. This was decided in the case of *Regina v. Eli*, (1886) 13 Ont. App. 526, the first occasion on which, so far as I know, such an appeal was ever attempted to be brought.

By the Judicature Act, passed on the 4th of March, 1881, the Court of Appeal as then existing was continued under that name (sec. 4); and was declared to be a Superior Court of Record with all the power and jurisdiction which it theretofore had, save as varied by the Act (sec. 13); and see R.S.O. ch. 51, sec. 49; and in civil cases had also jurisdiction and power to hear and determine appeals from any judgment or order of the High Court, or any judge thereof, save as excepted. These words, "or order," were an extension of the jurisdiction which the Court formerly possessed as regards the right of appeal from orders made by the Superior Courts of Law: *Hately v. Merchants Despatch Co.*, (1886) 12 Ont. App. 640.

Although much that is said in the case of *Regina v. Eli*, above cited, is adverse to the appellant's contention, yet it is not entirely decisive of the case before us, because the

conviction there was made under the authority of an Act of Parliament, the Canadian Temperance Act, and the question related to criminal law and procedure strictly. Here the conviction is made under a by-law passed under the authority of a local Act, and the Legislature could, had it thought proper to do so, have given an appeal to this Court.

The appellant contends that the appeal lies under the general language of the Judicature Act, the judgment by which the conviction was quashed being a judgment or order of the High Court. The question is whether the proceeding in the High Court was a "civil case" within the meaning of the 49th section of the Act. It may be conceded that it was not a matter relating to criminal law or procedure within section 91 (27) of the British North America Act, but I do not think it necessarily follows from this that it falls within the scope of the Judicature Act, or is subject to the procedure which that Act provides in relation to ordinary causes, actions and matters *inter partes*.

The summary procedure before justices under Acts of the Provincial Legislature is by law similar to that under Dominion legislation. Special provision is made with regard to appeals to the General Sessions, etc., from summary convictions under Provincial Acts, and the practice and procedure thereon: R. S. O. ch. 90. The jurisdiction of the High Court to review such convictions when brought before it on certiorari, to the same extent and in the same manner as summary convictions under a Dominion Act, seems not to be interfered with: Judicature Act, sec. 25. The practice in that respect followed in the High Court as to both classes of convictions is substantially the same.

The procedure in matters of this kind appears, therefore, to be special and independent of the provisions of the Judicature Act.

And although summary proceedings for infractions of the laws of the Provincial Legislature, or by-laws passed under their authority, may not be criminal procedure within the meaning of the British North America Act, yet they have a

very close analogy to it, relating as they do to what has been described as provincial criminal law, the dividing line between which and the criminal law, which is the subject of the jurisdiction of Parliament, is shadowy and uncertain. Considering, therefore, the provisions of the Judicature Act alone, and their apparent scope and object, I should have thought it was not intended by the Legislature that there should be an appeal to this Court from an order of the High Court quashing a conviction. We are not, however, without light from other statutes. In the same session as that in which the Judicature Act was passed, by another Act passed on the same day, viz., 44 Vict. ch. 27, an appeal was, by section 17, expressly given to this Court from an order of the High Court quashing a conviction for breach of the Liquor License Act or its amendments, when the Attorney-General of the province certified that the point "was of sufficient importance to justify the case being appealed." This section is now sec. 121 of R.S.O. ch. 245, and under its authority the case of *Regina v. Hodge*, (1882) 7 Ont. App. 246, a conviction for breach of some regulation of license commissioners under the Liquor License Act, was brought and decided. Clearly this was an unnecessary enactment, had the Legislature supposed that the Judicature Act, the chief Act of that session, had given any right of appeal in such cases. Some years after this, and after the decision of this Court in the case of *Regina v. Eli*, (1886) 13 Ont. App. 526, the attention of the Legislature was again directed to the subject, and by 52 Vict. ch. 15, sec. 3 (Ont.), R.S.O. ch. 91, an appeal was again expressly given to this Court from a judgment or decision of the High Court, or a judge thereof, upon an application to quash a summary conviction made under a provincial statute, provided that the Attorney-General for Canada, or the Attorney-General for Ontario, certified his opinion that the decision involved a question on the construction of the British North America Act, and that the same was of sufficient importance to justify the case being appealed. The immediate object of this Act was to have the decision of the High Court in *Regina v. Wason*,

(1889) 17 Ont. R. 58, reviewed. The decision of this Court is reported in 17 Ont. App. (1890) 221.

The Legislature thus again affirmed its opinion that special legislation was necessary to confer jurisdiction upon this Court to entertain appeals of this nature, and that such jurisdiction should be of a very limited character.

The appeal before us not being within either of the Acts referred to, is, like that in *Regina v. Eli*, a mere experiment and must be quashed with costs, including the costs of the motions and proceedings in Chambers.

*Appeal quashed.*

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[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, HANINGTON, LANDRY AND BARKER, JJ.

**Ex parte DOHERTY.**

*Summary proceedings—Failure to have witness sign his depositions—Matter of procedure—Jurisdiction of magistrate—Cr. Code 590.*

1. Non-compliance with section 590 of the Criminal Code which requires that depositions taken before magistrates in summary proceedings shall be signed by the witness is not a matter affecting the jurisdiction of the magistrates to convict.

ARGUED : February 3, 1894.

DECIDED : April 18, 1894.

This was an application for a certiorari to remove a conviction of the applicant, Patrick Doherty, had before Wilford D. Fowler and John H. Fowler, two Justices of the Peace for the County of King's, for selling intoxicating liquor contrary to the provisions of the Canada Temperance Act. The objection to the conviction was, that the Justices acted without jurisdiction, inasmuch as the depositions of the witnesses called on the part of the prosecution were not read over to nor signed by the witnesses, nor signed by the Justices, before the

accused was put upon his defence, as required by the Criminal Code, section 590.

An order nisi had been granted by PALMER, J.

FREDERICTON, N.B., February 3, 1894.

*F. A. McCully* showed cause.

*A. I. Trueman* supported the rule.

FREDERICTON, April 18, 1894.

The judgment of the Court was delivered by

TUCK, J.—

The ground upon which the order nisi for a certiorari was granted in this case, is that the formalities required by the Criminal Code as to taking the evidence, have not been complied with.

The only point argued was that the depositions are not signed by the witnesses and that the witnesses were not re-sworn after their testimony had been given.

Section 590 of the Criminal Code, 1892, sub-section 3 enacts, that "the evidence of each witness shall be taken down in writing in the form of a deposition, which may be in the form S, in schedule one hereto, or to the like effect"; and sub-section 4 enacts, that "such deposition shall at some time before the accused is called on for his defence, be read over to and signed by the witness and the justice, the accused, the witness and justice being all present together at the time of such reading and signing."

The witnesses in this case have not signed the depositions.

In our opinion section 590 has relation only to a matter of procedure, and its not having been complied with, does not affect the jurisdiction of the magistrates to make a conviction.

The judgment of this Court in *Ex parte Danaher*, 27 N.B.R. 554, fully bears out this view.

To show the absurdity of the contention that a certiorari ought to go in this case, one has only to look at sub-section



6 of section 590 : that sub-section enacts that "every justice holding a preliminary inquiry, is hereby required to cause the depositions to be written in a legible hand, and on one side only of each sheet of paper on which they are written." Now, the depositions here are written on both sides of each sheet of paper. But because of that, no one can reasonably argue that the magistrates did not have jurisdiction to convict.

We think that the rule must be discharged.

*Rule discharged.*

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[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., GRAHAM, E.J., MEAGHER AND HENRY, JJ.

**THE QUEEN v. MOSHER.**

*Criminal trial court—Powers of presiding judge out of term—Reserved judgment on application in term—Order 'nunc pro tunc'—Award of costs against private prosecutor when bill of indictment ignored—Review by court en banc—Jurisdiction.*

1. An order made by the presiding judge of a criminal superior court awarding costs against the private prosecutor in respect of an indictment for assault on which the grand jury found no bill, is not subject to review by or appeal to the court *en banc*.
2. Where the application for such an order has been made on the last day of the term of the criminal court and judgment reserved thereon the order may be legally made out of term *nunc pro tunc* as of the date of the application, the delay in such case being the act of the court and not being due to the neglect or fault of the applicant.

ARGUED : January 27, 1899.

DECIDED : March 14, 1899.

Motion to set aside the judgment and order of Townshend, J., awarding costs against the prosecutrix. The facts are set out in the opinions delivered.

HALIFAX, January 27, 1899.

*J. J. Power* in support of motion : The order is bad on its

face. The order is not an order of this court, but an order of the learned judge made in chambers. *O'Gorman v. Westhaver*, 22 N.S.R. 314; *The Queen v. Creelman*, 25 N.S.R. 404; *Re Cameron's Circus* (1881) 14 N.S.R. 248. This court can review the decision of a single judge sitting as a court. Can. Criminal Code, s. 595 is the section under which this order is made. Ann. Prac., 1889, p. 751; *Sweeton v. Collier*, 1 Exch. 457. The judgment could only be given in court. It does not appear on the order that it was made in court. *O'Gorman v. Westhaver*, 22 N.S.R. 314; *Christie v. Unwin*, 11 A. & E. 379. The grand jury was improperly constituted. N. S. Acts, 1898, c. 63, does not cover the case where twenty-four jurors are drawn instead of twelve. [HENRY, J.—Under *The Queen v. Cox* (1898) 2 Can. Crim. Cas. 207, twenty-four is the proper number, and though the learned judge may have decided the point on wrong reasons, he was right in the result].

*Hon. J. W. Longley*, Q.C., Attorney-General, contra : A judge, sitting as a criminal court, can hear an application and deliver judgment on it after term. *The Queen v. St. Louis*, 1 Can. Crim. Cas. 141; *Ex parte Pullbrook*, [1892] 1 Q.B. 86. If the words "Oct. 20th" did not appear in the rule no question could arise. They do not form any part of the rule. 11 Wkly. Rep. 330 and 380.

HALIFAX, March 14, 1899.

MEAGHER, J.—

The order attacked is entitled on the Crown side of this court, and has relation to a proceeding in a criminal matter which was before the grand jury at the last criminal term in Halifax.

I am of the opinion that this court has no jurisdiction to review or discharge that order in the way we have been invited to do.

It has not been brought up by any of the methods prescribed by the Code, or any statute, or rule of procedure, which vests in this court the power to revise proceedings

arising upon criminal trials, or in connection with proceedings upon indictments, or arising out of steps taken to procure an indictment, or founded thereon.

The power to hear cases reserved from the criminal court, or appeals, or other applications, in relation to matters pending or determined therein, is not an original, nor an inherent jurisdiction, but is statutory and in a sense appellate only. I say "in a sense" in reference to reserved cases alone.

*In re Sproule*, 12 Can. S.C.R. 140, is relied on to show that we have the power sought to be invoked here. I am unable to regard that case as in point.

The proceeding which the court, on motion, set aside in that case was an order made in the Supreme Court, and by a judge thereof, in his capacity as a member of that court, and in the exercise of a power which he thought was given to him as a judge of that court by one of the sections of the statute creating it, and not, as here, by a judge in, what to all intents and purposes is to be regarded, in this particular, as another court separate and distinct from this.

A perusal of that case will show that the court was of opinion that the section, under the supposed authority of which the order was made "did not create a separate and independent court, nor confer on the judges a jurisdiction outside of and independent of the court." In that view the judge who made the order was properly regarded as a delegate of the court, and, therefore, its power over his decision and order was undoubted.

The learned judge who made the present order, assuming it to be the order of a judge only, did not make it as a judge of this court, nor in any sense as a delegate of this court, nor in the exercise assumed, or actual, of any power which he at that time possessed in common with this court, but made it in the exercise of a power which this court does not possess. The case referred to, therefore, does not apply.

The order in question was not made in chambers, but on its face appears to be an order of the criminal court, if I may so term it, made during the criminal sittings when Mr.

Justice Townshend was presiding. From such an order there is no appeal to this court *in banc*; neither has the court power to rescind or discharge it.

There are no facts in the present record proving that the order was not made during the criminal sittings and before its close, and, therefore, if for no other reason, we ought not to interfere with it.

The mere fact that a judge of this court presides at the criminal term and disposes of the business therein, cannot give this court jurisdiction to revise his proceedings. His position is the same as if he held a commission separate and distinct from this court for the purpose of holding such term.

The equity court, as it existed prior to the Judicature Act, might in the same sense equally be said to be a part of the supreme court. It was the equity side of this court, but that fact conferred no right or power upon this court to revise or review the proceedings of that court, except under appropriate provision in that behalf by way of appeal, or by some other duly prescribed method. It was, therefore, to all intents and purposes, the same as if it was an entirely distinct court, and not the equity side of this court, and it was always, as far as I am aware, so regarded. The equity court, like the criminal court, had its special duties, powers and functions, separate and apart from this court, and special regulations were prescribed by statute, or rule, whereby its proceedings were brought into this court for revision. The same can be said of the criminal court, and, if in respect to some proceedings therein, no provisions have been made whereby those proceedings may be carried into this court for revision, it may safely be said that this court has no power to touch them.

If the situation is not as I have described it, and that court is essentially a constituent part of this court, it must follow that every step, order and proceeding in the former must be open to review in this court; I feel persuaded that that is a position which cannot be sustained.

Assuming, however, that none of the foregoing views are correct, and that the decision upon which the order is founded was pronounced on the 10th of October, and that the term ended on the 8th, and that we have power over the order so made, and which is to be regarded as an order in chambers, it is obvious that the delay between the 8th and 10th was the act of the court, and was not due to the neglect, or fault of any of the parties—and, therefore, it is a proper case for an order *nunc pro tunc*, so that prejudice will not be occasioned to any one by the act or delay of the court.

Moreover, on the same assumption, I do not see why we cannot regard the order, and so treat it, as if made on the day it purports to be.

Cockburn, C.J., in *Moor v. Roberts*, 27 L.J.C.P. 246, said, referring to the entry of judgment :

“It is to be taken as done at the trial so that the parties may not be prejudiced by the delay of the court.”

That observation was made in a case where leave to move the court *in banc* was given, and where the motion was argued and decided long after the trial. I have no doubt that the order was rightly made. If so, and if we have the power asserted, then we should give leave to make the order *nunc pro tunc*. The same purpose, however, will be served by regarding it as made at the time it purports to have been. But, even if we gave such leave, according to *Moor v. Roberts*, above cited, there would be no occasion to discharge the order before us.

*The Queen v. Creelman*, 25 N.S.R. 404, was referred to, but it may be distinguished, perhaps, if only on the ground that the process attacked there was merely an execution to enforce payment of the costs. Apart from that, however, I desire to say that its authority has been much shaken by the case of *Regina v. Brooke*, 11 Times L.R. 163, (Wright and Wills, JJ.), on the subject of the necessity of a notice. On that point it is in conflict with the case last mentioned, which is in accord with the views of the minority in *Creelman's* case. There was not, as I understand *The Queen v.*

*Creelman*, an order as there is here, and there was, perhaps, room—I do not say there was—for the contention that the court into which the writ of *fi. fa.* sought to be set aside, was made returnable, was the one in which the motion should be made, and in which it was made. None of these elements exist here. I feel entirely convinced that we have not the power to grant this motion, and, therefore, it should be refused.

RITCHIE, J., concurred.

GRAHAM, E.J. (dissenting)—

At the autumn criminal sittings of the Supreme Court at Halifax, the prosecutrix preferred a bill against the defendant, Mosher, for an assault, which bill the grand jury ignored. The defendant made an application to the court for an order to compel the prosecutrix to pay to the defendant certain costs of his defence. Judgment was reserved, and on the 8th October, 1898, the court adjourned *sine die*. At the hearing before us, the counsel for the prosecutrix proceeded to read an affidavit, filed the 27th January, to prove this fact, that the court had adjourned, when it was very properly admitted by the learned Attorney-General, who was opposed to him. No judgment was pronounced in court. On the 10th of October the learned judge, following the practice in civil causes, filed with the officer of the court a memorandum stating that he granted the application. The defendant drew up an order, and the learned judge initialled it, but it was ante-dated. I am sure the date was not called to the attention of the learned judge. It purports to have been issued on the 8th of October, *i.e.*, within the period when the court was sitting, but while the case was under deliberation. There is not any statute which enables judgment to be filed in a criminal case, or which provides for the initialling of orders.

The memorandum filed and the order are in the following terms :

"In view of c. 63, Local Acts, 1898, to which my attention had not been called at the argument, I do not think the prosecutrix entitled to call into question the constitution of the grand jury. In view of the motion of the prosecutrix, and the fact that the stipendiary magistrate, as well as the grand jury, dismissed the charge, in my opinion properly, I think this is a proper case to award costs against the prosecutrix, the amount of which I will determine on application.

(Sgd.) "CHAS. J. TOWNSHEND."

October 10th, 1898."

"C.J.T.

[L.S.]

Upon hearing the notice of motion herein, and the affidavit of Willoughby Mosher and Sarah Smith on file herein, and upon hearing W. F. MacCoy, Q.C., and J. J. Power, Esq., for Sarah Smith, and on motion,

It is ordered, adjudged and decreed, that Sarah Smith do pay to said Willoughby J. Mosher, the defendant herein, the costs of said defendant.

The amount of said costs to be determined upon application to me.

It is also ordered that defendant have execution for said costs when determined.

(Sgd.) "S. H. HOLMES,"

Prothonotary.

Dated, Halifax, October 8th, A.D., 1898."

It will be noticed that the order purports to be signed by the officer as prothonotary, not as clerk of the Crown. It has not any expression, like that formerly found in orders, "by the court," or any expression like that now found in orders, "Before Mr. Justice ——— in court." It simply purports to be the order of the prothonotary. But it is an order to pay costs, and it provides for the issuing of an execution to recover those costs.

This is a motion made before this court, sitting *in banc*,

to set aside this order, upon a notice containing the following among other grounds :

“ 1. Because the said judgment and order are both bad in law.

2. Because the said learned judge had no jurisdiction to make said order, or deliver said judgment.

7. Because the said order, moved against herein, is bad on its face, inasmuch as it does not appear to have been made by this court, which was the only competent authority to make the same.

And for other grounds appearing on the papers on file herein at Halifax, and in the papers and affidavits on which this application will be made.”

In my opinion the order is bad, because there was no judgment of that date. It could not be taken, even in a civil cause, *nunc pro tunc*, without leave of the court, and it was not a case in which such leave would be given. It was just the ordinary case of reserving judgment beyond the sittings. Neither prosecutrix nor defendant died, and there were no other special circumstances which would justify the issuing of an order *nunc pro tunc*. There was no court sitting when the memorandum was filed, or when the order was taken, and it is, therefore, a simple nullity. But, by reason of its false date, and because an execution may issue upon it, and a sheriff may attempt to justify under that execution, it is a nullity which the court ought to set aside, to prevent an abuse of its process.

The power of the Supreme Court, sitting *in banc*, to set aside this order, is questioned. It is said that there are two courts. In my opinion there is but one—the Supreme Court. For trials, both civil and criminal, it is composed of but one judge. Formerly more than one judge sat, and more than one may sit now, but, by express provision, that is not required. Outside of Halifax it takes up civil and criminal cases indiscriminately at the sittings, and there is but one jury in attendance for both. At Halifax, by a rule made by the judges, there are two sittings of the Supreme Court in



the year for criminal trials, and two for civil trials. The rule runs thus, O. 58, R. 11 :

“ There shall be two sittings for criminal trials : one on the third Tuesday of March, and the other on the third Tuesday of October, in each year, to be continued until all the business is disposed of. These sittings shall be attended by the grand jury and all other persons whose duty it may be to attend the sittings of the court in connection with the criminal business thereof.”

Then there is a rule providing for a petit jury for these sittings, and that is all. If the court holding such sittings has any other powers it gets them from the Criminal Code—not from any provincial enactment or rule.

The Supreme Court possesses the jurisdiction of the former Court of Queen's Bench in England, both on its Crown side and plea side. In 1891 Crown rules were passed, and since those rules proceedings in criminal and quasi criminal causes, following the English rules, are marked “ on the Crown side.” The officer is both prothonotary and clerk of the Crown, but in respect to the proceedings on the Crown side, he is styled clerk of the Crown. The seal is the same for both sides ; the process is the process of the Supreme Court. See the book of forms for the use of the officers. The Supreme Court *in banco* takes up indiscriminately causes on the Crown side and on the plea side. There is the one docket for civil and criminal causes, and the court never adjourns to pass from the hearing of a cause on the Crown side to one on the plea side. By the Criminal Code, the cases reserved and the appeals are to be heard by the “ court of appeal,” which, by the interpretation section, means the Supreme Court. The Crown rules provide for motions to be heard by the Supreme Court *in banco* in a number of cases, but the Crown rules do not exhaust the subject of the powers of the Supreme Court on its Crown side. I must refer to 2 Hawkins' Pleas of the Crown, c. 3, to show how extensive that jurisdiction was. The procedure by motion on the Crown side is provided for.

Now the question arises whether an application to set

aside this defective order is to be made to the Supreme Court sitting *in banco*, or to the Supreme Court sitting for criminal trials in March or October. When did the Supreme Court, having the extensive power and jurisdiction of the Court of Queen's Bench on its Crown side, lose the power to set aside an order granting an execution which will be its execution, and which will amount to an abuse of its process? Surely not by reason of the judicature rule to which I have referred, which provides that there shall be "two sittings for criminal trials." It must be the Supreme Court sitting *in banco* which has the residuum of power, and the Supreme Court sitting for criminal trials which has only the power expressly given to it.

Then there is the case of *In re Sproule*, 12 Can. S.C.R. 140. That decision enables this court, sitting *in banco*, to say that it will not allow its process to be abused, as it would be by the issuing of an execution in pursuance of an order which is a nullity—an order which is not the order of any court—because no court was sitting, either at a criminal sittings or *in banco*.

I also refer to *In re Ramsay*, L.R. 3 P.C. 427. Then there is the decision of this court in *The Queen v. Creelman*, 25 N.S.R. 405, in which the Chief Justice, and Weatherbe and Henry, JJ., Ritchie and Meagher, JJ., dissenting, set aside an order made by the Supreme Court, sitting at a criminal sittings in Halifax, to estreat a recognizance, because there was not notice of the application to estreat given. And this point is specifically taken, namely, that the Supreme Court *in banco* cannot set aside the order of the Supreme Court made at a criminal sittings.

Mr. Justice Henry's judgment on this point is as follows :

"I am of opinion, as to the fourth and last question, that this court sitting *in banco* has jurisdiction to rescind and set aside the proceedings in question. It would seem to be a matter of course that an order or rule of a judge, exercising the powers of the court on circuit, in such a matter as this, might properly be reviewed by the court *in banco*, just as it could, under such conditions as we have here, be reviewed

by himself sitting in court and exercising the same jurisdiction as when he granted it. When the judges of this court are sitting on circuit, or at the civil or criminal sittings at Halifax, they are admittedly exercising the powers of the court, and it seems to follow, as a necessary consequence, that the court sitting *in banco* must have the same power to rescind an order irregularly made, and to set aside and stay process upon it, as the judge exercising those very same powers would undoubtedly have."

There is, of course, no appeal to this court, except in the cases provided by the Code, from the judgments of the Supreme Court sitting in March and October, and this case is not covered by the Code. If the most ample appeal was given, as ample as that given in civil causes, this would not be a case for an appeal. How can you appeal unless there is a judgment to appeal from? An appeal cannot be taken from the ministerial act of an officer drawing up an order with a wrong date.

It is very easy to point out that there is no appeal, but it seems to be irrelevant. The question is, whether there is any remedy, and whether that remedy is not an application to set aside an order that will result in an abuse of the process of the court, and whether that application should not be made to the Supreme Court sitting *in banco* rather than to the Supreme Court sitting for criminal trials.

In my opinion, the order should be set aside, and without costs.

HENRY, J., concurred with GRAHAM, E.J.

*Motion dismissed, the court being equally divided.*

## [COUNTY COURT, COUNTY OF YORK, ONTARIO.]

BEFORE HIS HONOR JOSEPH E. McDOUGALL, COUNTY JUDGE.

## THE QUEEN v. MCLEAN.

*Police Magistrate—Jurisdiction—Ex-officio justice of the peace—Powers under Police Magistrate's Act (Ont.)—Session in city having a separate magistrate—Validity—Intoxicating liquors—Diluted lager beer—'Temperance drinks'—Percentage of alcohol.*

1. A town police magistrate in Ontario may, in respect of an offence under a provincial statute committed in a part of the same county for which there is no police magistrate, take the information at a city or town (within the county) having a separate police magistrate; and may there try the case as an *ex-officio* justice of the peace, having the powers of two justices of the peace under the Ontario police magistrates' Act
2. Diluted lager beer showing on analysis an average strength of 2.05 per cent. of alcohol is an intoxicating liquor within the prohibition of the Ontario Liquor License Act.

DECIDED : February 15, 1899.

This was an appeal by the Crown from an order made by P. Ellis, Esq., Police Magistrate for the Town of Toronto Junction, dismissing an information laid against the defendant charging him with selling liquor without a license at the Village of Woodbridge, in the County of York, on the 19th October, 1898. The order of dismissal bears date January 6th, 1899. The County Crown Attorney filed the fiat of the Attorney-General to prosecute this appeal.

*DuVernet*, for the defendant, took a preliminary objection to the validity of the proceedings, on the ground that they were *coram non judice*, because Mr. Ellis, as he contended, had no jurisdiction to institute or adjudicate upon the case sitting in the City of Toronto, for the following reasons :

1. Mr. Ellis is Police Magistrate for the Town of Toronto Junction only. The offence, if any, was committed at

Woodbridge, a place outside of the territorial limits fixed by his commission as police magistrate.

2. The information was sworn before Mr. Ellis in the City of Toronto, the city having a police magistrate of its own, and the summons issued thereon directed the defendant to attend for trial before him at the Court House in the City of Toronto. The defendant was a resident of the City of Toronto, the sale of liquor complained of being made by him at the Woodbridge Fair at some booth or stall temporarily conducted by him. The information is the complaint of J. M. Pearen, of the Township of York, license inspector, and is taken before "The undersigned Police Magistrate in and for the Town of Toronto Junction, and one of Her Majesty's justices of the peace in and for the said County of York," and the jurat reads: "Taken before me the day and year first above mentioned at the City of Toronto. (Sgd.) P. ELLIS, Police Magistrate."

*Raney*, for the Crown, contra.

TORONTO, February 15th, 1899.

McDOUGALL, Co. J.—

I cannot do better than refer to the decisions dealing with the nature and extent of the powers and jurisdiction of police magistrates. In 1884, *Reg. v. Riley*, 12 Ont. Pr. Rep. 98, decided that a justice of the peace whose commission appointed him a justice of the peace for the County of Brant, and not excluding the City of Brantford, had power as a magistrate, while sitting in the County, to adjudicate upon any case arising in the County while sitting in the City of Brantford, notwithstanding such city had a police magistrate. Further, the opinion was expressed that if an offence was committed in the County, and the offender was found in the City, although this was a case in which the City Police Magistrate could properly act, but was not bound to do so, yet that the Justice of the Peace for the County might act in such a case and sit in the City, if he desired to do so.

In March, 1887, the Queen's Bench Divisional Court, in *Reg. v. Young*, 13 Ont. R. 198, decided (Armour J. dissenting) that a police magistrate appointed for the County of Lanark had no jurisdiction to act as such in a town included within the limits of the County, even if such town had no police magistrate of its own. This was the construction placed upon section 103 of the Temperance Act of 1878, which directed the prosecution, if an offence was committed in any County, City or Town having a police magistrate, to be before such police magistrate, or in his absence before the mayor or any two justices of the peace; but if the offence was committed in any city or town not having a police magistrate, then before the mayor thereof or before any two justices of the peace. The majority of the Court held that the commission to a police magistrate, constituting him Police Magistrate for the County, did not, without including the towns by name, extend his authority to towns in the County, even if such towns had no police magistrates of their own at the time. This decision was followed in *Reg. v. Bradford*, 13 Ont. R. 135, by Mr. Justice O'Connor, who was one of the judges forming the majority of the Court which decided *Reg. v. Young*. The case of *Reg. v. Young*, however, was not followed in May, 1888, in the Queen's Bench Divisional Court, Armour, C.J., who dissented in *Reg. v. Young*, adhering to his earlier view, and stating that the former Chief Justice, (Sir Adam Wilson) had authorized him to say that he had become convinced that the opinion he (the former Chief Justice) had formed in *Reg. v. Young* was wrong, and that the dissenting judgment was right. Falconbridge and Street, JJ., concurred with Armour, C.J., so that the Queen's Bench Division may be said to have reversed their earlier decision. In *Reg. v. Orr*, 16 Ont. R. 1, the Chief Justice went further, and held that if a police magistrate were appointed for a County, and another police magistrate for a town within the County, an offence committed in the town could be adjudicated upon by either police magistrate, but that the Town Police Magistrate, so long as there was a Police Magistrate for the County, could

only act within the territorial limits of the town, while the County Police Magistrate could exercise his jurisdiction anywhere in the County, including the town.

In 1887, the Common Pleas Division in *Reg. v. Lee*, 15 Ont. R. 353, held that a police magistrate whose commission was for the County of Brant, excluding the City of Brantford, could institute and try an offence committed anywhere in the County outside of the City of Brantford sitting in the City of Brantford, although that city, like Toronto, had its own police magistrate. In 1891, in *Reg. v. Gulley*, 21 Ont. R. 219, it was held that a Police Magistrate for a City could try in the City an offence committed in the County, and that in so acting, in a case under the Liquor License Act, he was, by virtue of his office of police magistrate, expressly qualified by s. 21 of the Police Magistrates' Act (now s. 30 of R.S.O. 1897, c. 87), "to do alone whatever is authorized by any statute in force in this province relating to matters within the legislative authority of the Legislature of the Province to be done by two or more justices of the peace."

Now, in the present case, Mr. Ellis as a police magistrate could have tried this case at Toronto Junction, not by virtue of his territorial jurisdiction as police magistrate, but by virtue of his being a Justice of the Peace for the County of York, ex officio possessing the power of two justices of the peace. He has power to try a case arising in the County, sitting anywhere in the County, so far as the place of trial is concerned. In my opinion, his jurisdiction to try a County case sitting in the City of Toronto is equally clear. The only restriction upon his acting in the City of Toronto is that he could not try a case originating in the city except in the illness, absence or at the request of the Police Magistrate for the City. Mr. DuVernet was forced to admit that his objection, to be good, must go to both the institution of the proceedings and the trial of the same. The case of *Reg. v. Riley* says that a justice of the peace can deal with a County case sitting in the City. Sec. 27 of the Police Magistrates' Act creates every Police Magistrate ex officio a Justice of the Peace for the County. The County includes

the city when united judicially. There is, therefore, no limitation as to place within the County as applied to a Police Magistrate acting in his capacity as a Justice of the Peace with the power of two justices of the peace. There is only limitation as to case, and this is governed by s. 7 of the Police Magistrates' Act (Ont.), which enacts that no justice of the peace shall admit to bail or discharge the prisoner . . . or otherwise act in any case for a town or city where there is a police magistrate . . . except in the case of the illness, absence or at the request of the police magistrate. I cannot, therefore, sustain the preliminary objection as to Mr. Ellis' lack of jurisdiction.

[The evidence showed that the liquor in question was diluted lager beer, and that on analysis it yielded an average strength of 2.05 per cent. of absolute alcohol. The learned Judge held that it was an intoxicating liquor under the Ontario Liquor License Act following his judgment in *Reg. v. Wotten*, 34 C.L.J. 746.]

*Appeal allowed.*

**Note :** *Intoxicating liquors—Meaning of—Percentage of alcohol—Temperance drinks.*

The case of *The Queen v. Wotten* (1885) 34 Can. Law Jour. 746, was a prosecution under the Ontario Liquor License Act, and the defendant's conviction was there affirmed on appeal to the same learned County Judge who delivered the judgment above reported. The analysis of "Blue Ribbon beer," the alleged temperance drink in question in Wotten's case, showed an average of 2.5 per cent. of alcohol. McDougall, Co. J., there said :

"It was established by clear evidence that with a strength of 2.5 per cent. of alcohol an Imperial pint of this liquor would contain  $\frac{1}{2}$  oz. of alcohol, and with 3 per cent. the quantity of alcohol would be three-fifths of an ounce ; an Imperial quart would, therefore, contain from 1 oz. to 1.2 oz. of alcohol. Now, it was shown by a large number of



**Note—Continued.**

the medical witnesses called on both sides that a person unaccustomed to the use of liquor, and taking it upon a comparatively empty stomach, would exhibit signs of intoxication if he took a drink of any liquor containing from one to two ounces of alcohol. Some thought  $1\frac{1}{2}$  to 2 ounces would undoubtedly produce that effect ; others that one ounce would be sufficient to indicate perceptibly to a third person observing the patient that he, the patient, had been drinking. In other words, the first stages of intoxication, as it is popularly known, would be produced. This being the case, from one quart to three pints of Blue Ribbon beer would render a person unaccustomed to the use of liquor, perceptibly under the influence of liquor, though not drunk. The first stages of intoxication would be produced ; and such a person would, in a large proportion of cases, become excited, talkative, perhaps giddy and unsteady on his legs, though possibly not incapacitated from performing all his ordinary duties. In view of this evidence, and the fact that this liquor is one that may increase perceptibly in strength if exposed to heat or motion, I can come to no other conclusion than one adverse to the appellant's contentions. It would be opening a wide door to a fraudulent evasion of the Act, and its wise provisions for controlling and regulating the sale of and traffic in intoxicating liquors if a liquor which contained even so small a percentage as  $2\frac{1}{4}$  to 3 per cent. of alcohol could be openly offered for sale without a license in every grocery, house or shop in the community. The law is not made alone to regulate what shall be sold to the man accustomed to the use of liquor, but is equally for those who are unaccustomed to its use, and these also must be protected. No one can be allowed to offer for sale without a license, under the guise of a temperance beverage, a liquor which is capable, if freely drunk, of producing even the incipient stages of intoxication. I think Blue Ribbon beer will do this if used freely by the class of persons last mentioned, though doubtless its effects upon more seasoned drinkers may be questionable."

[SUPREME COURT OF THE NORTH-WEST  
TERRITORIES.]

SOUTHERN ALBERTA JUDICIAL DISTRICT.

BEFORE ROULEAU, J.

## THE QUEEN v. "BEAR'S SHIN BONE."

*Polygamy—Indian marriage with two women—Criminal  
Code, 278 (a).*

1. An Indian who according to the marriage customs of his tribe takes two women at the same time as his wives, and cohabits with them, is guilty of an offence under sec. 278 of the Criminal Code.

DECIDED : March 9, 1899.

The prisoner, a Blood Indian, was charged under section 278 of the Criminal Code, sub-s. (i) and (ii) with practicing polygamy with two women belonging to the same band of Indians, and also with having, according to the marriage customs of the Blood Indian Tribe, agreed to enter into a kind of conjugal union with more than one person at the same time.

The evidence showed that the prisoner had been married according to the marriage customs of the Blood Indians to two women, "Free Cutter Woman" and "Killed Herself," both of whom were living with him as his wives, and that there was a form of contract between the parties which they supposed binding upon them.

Section 278 of the Criminal Code provides as follows :

278. Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars, who—

(a.) practices, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether

in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into

- (i.) any form of polygamy ;
- (ii.) any kind of conjugal union with more than one person at the same time ;
- (iii.) what among the persons commonly called Mormons is known as spiritual or plural marriage ;
- (iv.) who lives, cohabits, or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union.

CALGARY, ALBERTA, March 9, 1899.

THE COURT held that the marriage customs of the Blood Indian Tribe came within the provisions of sub-section (a) of section 278 of the Criminal Code, whether their ceremonies are those of a denomination, sect or society, or not, as their marriages are a form of contract, and recognized as valid; *R. v. Nan-e-quis-a Ka*, 1 N.W.T. Rep., part 2, page 21, referred to.

The prisoner was accordingly convicted.

*C. F. P. Conybeare*, Q.C., for the Crown.  
*M. Mackenzie*, for the prisoner.

**Note :** *Polygamy—Indian marriages—“Conjugal union”—Cr. Code, 278.*

Wherever marriage is governed by no statute, consent constitutes marriage, and that consent is shown by the parties living together. Unless some statute has rendered the observance of some form of marriage necessary, no particular form for expressing the consent is necessary, and nothing more is needed than that in language which is mutually understood or in any mode declaratory of intention, the parties accept of each other as husband and wife. Bishop on Marriage, secs. 225, 229.

**Note—Continued.**

By the North-West Territories Act (R.S.C. c. 50, s. 11), the laws of England, as of July 15, 1870, in civil and criminal matters were declared to be in force in the Territories *in so far as the same are applicable to the Territories*, and in so far as the same have not been or are not hereafter repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any Ordinance of the Lieutenant-Governor in Council (49 Vic. (Can.), c. 15, s. 3), or of the Legislative Assembly (60-61 Vic. (Can.), c. 28, s. 4.

In *The Queen v. Nan-e-quis-a Ka*, (1889) 1 N.W.T. Rep., part 2, page 21, it was unanimously held by the Supreme Court of the Territories (Richardson, Macleod, Rouleau, Wetmore, and McGuire, JJ.) that the laws of England respecting the solemnization of marriage were not applicable to the Territories, quoad the Indians, and that a marriage since the Territories Act between Indians by mutual consent and according to Indian custom is a valid marriage, provided that neither of the parties had a consort living at the time, "at any rate so as to render either one, as a general rule, incompetent and not compellable to give evidence against the other on trial charged with an indictable offence" (1 N.W.T. Rep., pt. 2, p. 25), under the rule of law that a wife is not competent or compellable to testify for or against her husband.

In that case the prisoner, an Indian, charged with assault, tendered the evidence of two women, whom he called his wives, and the trial judge admitted the testimony of the woman whom the prisoner had last married, but rejected the testimony of the one first married, and this ruling was affirmed by the full court on a Crown case reserved.

**Conjugal union—Meaning of.**

The mere fact of cohabitation between a man and a woman, each of whom is married to another, will not sustain a conviction under section 278 of the Code, formerly 53 Vic.

**Note—Continued.**

(Can.), c. 37, s. 11, to come within the terms of which there must be "some form of contract between the parties which they might suppose to be binding on them, but which the law was intended to prohibit," and the term "conjugal union" in the statute has reference to a form of ceremony joining the parties, a marriage of some sort before cohabiting with one another. *The Queen v. Labrie*, (1891) Montreal Law Reports, 7 Q.B. 211, per Dorion, C.J., Cross, J., Baby, J., Bossé, J., and Doherty, J.

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[COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J.

**O'GRADY v. WISEMAN.**

*Customs Act (Can.) sec. 197 (1888)—Keeping or concealing goods imported without payment of lawful duties—Penalty—Fine or imprisonment in addition to forfeiture—Construction of statute.*

1. Section 197 of the Customs Act of Canada as amended in 1888 is to be construed as making the punishment of fine or imprisonment, therein provided to be 'in addition to any other penalty,' applicable as well where the goods unlawfully imported into Canada are found and are thereupon liable to be forfeited and seized, as where they are not found, in which latter event the offender forfeits the value thereof.

MONTREAL, January 8, 1900.

WÜRTELE, J.—

By the Statute of 1888 amending the Customs Act, section 197 was repealed and was replaced by a section which reads as follows :—

"If any person knowingly harbors, keeps, conceals, purchases, sells or exchanges any goods unlawfully imported into Canada, whereon the duties lawfully payable have not

"been paid, such goods, if found, shall be forfeited and may  
"be seized. If such goods are not found, the person so  
"offending shall forfeit the value thereof; and every such  
"person, his aiders and abettors, shall, in addition to any  
"other penalty, forfeit a sum equal to the value of such  
"goods, which may be recovered in any Court of competent  
"jurisdiction, and shall further be liable, on summary con-  
"viction, to a penalty not exceeding two hundred dollars and  
"not less than fifty dollars or to imprisonment for a term not  
"exceeding one year and not less than one month, or to both  
"fine and imprisonment."

Under this section, Daniel J. O'Grady, a Special Officer of the Customs, laid an information on the 13th May, 1899, against John Wiseman, charging him with having, on the 29th April, 1899, at the City of Montreal, knowingly harbored, kept and concealed, two half boxes of cigars of the value of \$7.63, which had been unlawfully imported into Canada, and whereon the duties lawfully payable had not been paid.

The case was tried summarily before His Honor F. X. Choquet, one of the Judges of the Sessions of the Peace for the City of Montreal, and witnesses were heard both for the prosecution and the defence. The evidence disclosed that the two half boxes of cigars were found in the defendant's possession and keeping, concealed under the counter in his bar-room, that they were of the value of \$5.00, that they had been imported from the United States and that the duties payable on them had not been paid; but the learned magistrate, on the 31st May, 1899, dismissed the information, on the ground that the section in question established a penal law which had to be construed strictly, and that by its language the penalty imposed did not apply to the case where the goods on which duties had not been paid were found in the offender's possession and keeping, but that it only applied to the case where such goods were not found in his possession and keeping, and that this was not the case in the present prosecution.

The prosecutor immediately took an appeal to this court from the magistrate's judgment dismissing the information.

When the case in appeal was called the solicitors for the parties produced a written consent that the transcript of the evidence adduced before the magistrate should avail as evidence in the appeal, and stated that the sole controversy between the parties was as to the interpretation to be given to the substituted section of the Customs Act on which the information had been laid ; that the prosecutor on the one hand contended that the penalty mentioned in the section was imposed as well in the case where the goods were found as in the case where they were not found in the offender's possession and keeping, while the defendant on the other hand maintained that under the strict rule of interpretation which had to be applied to penal statutes, the penalty could only be construed and held to be imposed for the case where the dutiable goods were not found in his possession and keeping.

This is the only controversy which was submitted for the consideration of the Court, and the issue of the case depends on the decision of the point raised:—If the penalty applies to both cases, the appeal must be maintained, the judgment of dismissal must be quashed, the defendant must be convicted and the proper punishment must be imposed upon him, but if the penalty does not apply to the case where the goods have been found in the offender's possession and keeping, then the judgment of dismissal must be affirmed and the appeal must be dismissed.

The section substituted by the amending statute of 1888 is both remedial and penal. It is penal because it imposes for a violation of its provisions a punishment by fine and imprisonment and it is remedial because it was passed to amend the law for enforcing the due collection of the duties of Customs imposed on goods imported into the country. While on the one hand penal statutes as a general rule have to be construed strictly, on the other hand remedial statutes should be extended as far as their words will admit to every case within their purview. The language of a remedial statute should not be strained, but where the words are open to doubt, they should receive a construction which will

advance the objects which it has in view, and in fact such a construction should be given to the statute as will extend the remedy as far as the words used will admit. The strict construction to be put upon penal statutes does not consist in giving to words the narrowest meaning of which they are susceptible; the rule of interpretation and construction really is that such statutes are to be taken as not including anything which is not within their letter and spirit, which is not comprised in their words and which is manifestly not intended by the Legislature. When an offence against a penal statute is alleged to have been committed, and the question is raised as to whether it falls within the language of the statute, the Court has to examine and see whether on the one hand the intention of the Legislature and the spirit of the enactment have been violated, and whether on the other hand the language used by the Legislature directly or inferentially includes the offence. The general principles of construction apply to all statutes, including remedial and penal statutes, and therefore the general rule which requires penal statutes to be strictly construed must not be stretched so far as to defeat the evident and manifest intention of the Legislature. The obvious intention of the Legislature must not be defeated and the object of a statute must not be frustrated by refining words with too much nicety, or by putting a forced and strained meaning upon its language. The golden rule is that effect should be given to the intention of the Legislature, and that cases should not be excluded by excessive nicety and strictness to which the words ostensibly or inferentially extend. (Abstracted and adopted from Wilberforce on Statute Law, pp. 230 to 259.) In fine, the Court should refuse on the one hand to extend punishment to cases which are clearly not embraced in the statute, and on the other hand should equally refuse, and this is the exception to the general rule, by any mere verbal nicety and excessive strictness to exonerate parties who are plainly and manifestly within its scope. As to the intention of a statute it is inferred from the words in which it is expressed, in connection, (and especially in the case of a remedial statute,) with the facts



and circumstances relating to the subject legislated about, which existed at the time when it was passed.

I will now apply these principles to the substituted section of the Customs Act and to the case which I have now under consideration.

The section of the Customs Act which was amended and replaced in 1888 ran as follows :—

“ Every person who knowingly harbors, keeps, conceals, purchases, sells or exchanges any goods illegally imported into Canada, whereon the duties lawfully payable have not been paid, shall for such offence forfeit such goods, and shall incur a penalty equal to treble the value thereof.”

This section inflicted a forfeiture in cases where the goods on which the duties had not been paid were found in the possession or keeping of the offender, and it also imposed a penalty for every violation of the enactment, whereas the remedial section, which amends and replaces it, provides for a forfeiture in the case where the goods are found in the possession or keeping of the offender and for its equivalent, the forfeiture of a sum equal to their value, in the case where they are not found in his possession or keeping. The violation of the law is the same in either case, and it cannot be assumed that Parliament, in amending the law, intended to exempt one case from the infliction of a penalty and to impose it in the other ; that where the offence was the same it intended to discriminate between the two cases. It is, on the contrary, apparent and manifest that the object of the remedial section was to make the person who illegally imported goods without paying the duties lawfully payable, liable to practically the same punishment whether the goods were found or were not found in his possession or keeping. Such is evidently the intention of Parliament and also the spirit of the enactment ; and this intention and spirit can be gathered and inferred from the circumstances relating to the subject legislated about and from the state of the law, as they existed at the time when the remedial section was passed. Then, the language of the substituted and remedial

section clearly imposes a penalty, and even imprisonment, upon every person who has unlawfully imported goods without paying the duties lawfully payable, although it does so after the paragraph enacting that if goods on which the duties have not been paid are not found, the offender shall forfeit their value, and to construe this latter part of the section, by refining in nicety the words used, and by putting a restricted meaning upon its language, as only imposing the penalty and the imprisonment on offenders when the goods are not found in their possession and keeping would certainly defeat the intention of Parliament and frustrate one of the objects of the law.

When the goods are found they are forfeited, and when they are not found, the offender forfeits their value; but in both cases the violation of the Customs law is the same in degree, and the punishment in addition to the forfeiture of the goods or of their value should be and is, as a natural consequence, incurred in both cases; and that it must be so, certainly appears to have been the intention of Parliament and to be the spirit of the enactment notwithstanding its imperfect construction and wording.

After a full and careful consideration I am of opinion that the punishment imposed by the section under which the prosecution has been brought applies to the case where the goods are found in the possession and keeping of the offender as well as to the case where they are not so found, and that the information should not have been dismissed on the ground that it did not fall under the purview of section 197 of the Customs Act as replaced in 1888. As I have already stated, the commission of the offence charged against the defendant in the information was clearly proved by the evidence.

I therefore maintain the appeal, with costs, and quash the judgment dismissing the information; and, proceeding to render judgment in the case, I convict the defendant, John Wiseman, of the offence of having on the 29th April, 1899, at the City of Montreal, knowingly harbored, kept and concealed two half boxes of cigars, of the value of \$5, which

had been unlawfully imported into Canada and whereon the duties lawfully payable had not been paid, and I adjudge the defendant for his offence to forfeit and pay the sum of \$50, to be paid and applied according to law ; and also to pay to the prosecutor, Daniel J. O'Grady, the sum of \$12.43 for his costs in this behalf, and if such penalty and costs are not paid on or before the fifteenth day of January instant, I adjudge the defendant, John Wiseman, to be imprisoned in the common gaol of the District of Montreal, for the term of three months unless such fine and the costs of the prosecution, and also the sum of \$1.50 for the costs and charges of conveying him to the common gaol<sup>2</sup> are sooner paid.

*Appeal allowed.*

*George F. O'Halloran*, for the prosecutor.

*J. L. Decarie*, for the defendant.

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., AND WEATHERBE, RITCHIE,  
TOWNSHEND, MEAGHER AND HENRY, JJ.

## THE QUEEN v. McBERNY.

*Speedy trial before County Judge—Separate charges tried consecutively—Adjournment of trial—Verdict or finding reserved until conclusion of all trials—Illegality—New trial—Theft—Proof of intent—Evidence of similar acts—Cr. Code 777.*

1. Notwithstanding Cr. Code sec. 777 authorizing the adjournment of a trial, it is not competent for a judge trying a charge without a jury under the Speedy Trials clauses of the Code to postpone his decision on the first charge until he has heard the evidence on several other charges against the same accused party, and to then decide the question of guilt in all.
2. To interject one trial into another trial of the same accused person for another offence is a proceeding which prejudices his defence and entitles him to a new trial upon both charges.
3. If time be required in the first case for deliberation on the question of guilt after hearing the evidence, an adjournment may be made, but the trial of the subsequent charges must likewise be postponed.
4. To show the animus of an act, evidence of previous and subsequent conduct in the commission of other acts of a like character is admissible, although such other acts are in themselves crimes.

ARGUED : November 30, 1896.

DECIDED : January 12, 1897.

The defendant, Edward McBerny, was tried in the County Court Judge's Criminal Court for District No. 1, on four distinct charges of theft, viz., from A. M. Hodge, confectioner, from Lane & Connolly, booksellers, from the Stamp Office in connection with the General Post Office, and from the Halifax Ticket Office of the Dartmouth Ferry Commission. The defendant, in each case, having made a small purchase, tendered a note of considerably larger amount in payment, after which he confused the person from whom the purchase was made, with the result that he obtained a larger amount in change than he was entitled to.

The defendant was convicted in the County Court of each offence charged, but several objections were raised, and, at the instance of defendant's solicitor, were now stated for the opinion of this court, as a Crown case reserved. The objections stated, and the points relied upon on the argument are sufficiently indicated in the judgments.

HALIFAX, November 30, 1896.

*Hon. J. W. Longley*, Attorney-General, for the Crown.  
*F. T. Congdon*, for defendant.

HALIFAX, January 12, 1897.

TOWNSHEND, J.—

The defendant has been convicted by the Judge of the County Court, District No. 1, of four distinct and separate thefts. At the instance of his counsel, the learned judge reserved for the consideration of this court several questions, but, at the argument, all were abandoned, except the two following :

- (1.) That evidence of similar offences committed by accused and received in evidence was irrelevant and inadmissible on the trial of any of the other charges.
- (2.) That judgment was not pronounced in any of the cases until the evidence in all the cases had been concluded.

As to the first the judge states :

"I held that although the evidence offered and received was proof of another crime, yet that, notwithstanding, it was relevant, and receivable as evidence to determine whether the act charged was done accidentally through mistake, or wilfully with guilty intent, and knowingly and by design."

In so deciding the judge was clearly in the right. When the animus of an act has to be shown, previous and subsequent conduct will be evidence of it. Thus the animus in uttering counterfeit coin may be proved by evidence of previous utterings, and the possession alone of several pieces

of counterfeit coin is evidence of guilty knowledge. *R. v. Jarvis*, Dearsly C.C. 552.

Numerous authorities may be found for the admission of testimony of similar acts to determine the question of guilty intent. Indeed Mr. Congdon practically conceded this point at the close of the argument.

Reliance was placed principally on the second question. On this point the judge below, after stating the dates at which he concluded taking the evidence in each case, says :—" On the 15th, in the afternoon, I closed the Lane and Connolly case, as far as the evidence and addresses are concerned, and on the morning of the 16th July, delivered the judgments in all four cases." He then adds :

" I claim the inherent right to regulate the practice of my courts, and to arrange and conduct its business as appears to me most convenient, and as the ends of justice seem to me demand, and I also submit that, if statutory enactment be required for the course I pursued, it is found in sec. 777 of the Code, where the judge is empowered to adjourn any trial from time to time, until finally terminated. A trial, it is submitted, is not finally terminated when the evidence has been put in, and the addresses heard, nor can it be said to be finally terminated while anything remains to be done."

The judge below, in my opinion, is wrong in the extensive power claimed, of an inherent right to adopt any course he may consider convenient in the trial of accused persons. If that were so he would be clothed with powers not possessed by the superior courts, in the exercise of which grave irregularities, and probably much injustice, might follow. No such loose and uncertain procedure could be sanctioned. On the contrary, in that court, in the conduct of criminal trials, the same principles must prevail, and the same rules of procedure must be observed as in other courts of criminal jurisdiction, except in so far as modified by statute.

One of these modifications is sec. 777 of the Criminal Code, under which this mode of procedure is attempted to be justified, but that section confers no such authority. It reads

as follows :—"The judge may adjourn any trial from time to time until finally terminated."

The object of this clause is to empower the judge to adjourn the particular trial from time to time for such necessary purposes as receiving further evidence, or, in case of some unforeseen accident, such as sudden illness of counsel or a witness, or for the purpose of considering his judgment. Full effect and meaning is given to the words by this construction. The wide interpretation by the judge below, of unlimited and undefined power of adjournment, is both contrary to the spirit of our system in the administration of the criminal law and subversive of the right of the accused, and cannot be upheld. But, it does not, in my opinion, touch the question submitted for our consideration, that is to say, whether it was competent for the judge to postpone his decision on the first charge, until he had heard all the evidence on the several other charges against the same accused party, and then decide all.

This is a more important question than at first sight it appears to be. I was, at first, impressed with the view that, inasmuch as the judge in this case rightfully admitted evidence of the other charges, to show the animus of the accused, there would be no objection to reserving his decision until after the evidence in all was heard. In this particular case I doubt if the prisoner was at all prejudiced by this course. We are, however, bound to decide on general principles applicable to the administration of criminal justice. It is a fundamental principle that the accused must be tried, and tried only on the evidence given in relation to the particular charge on which he is then indicted, and to which he has pleaded. All extraneous matters, which may affect the minds of the judge or jurors, must be rigidly excluded. In the County Court criminal jurisdiction, the judge is also the jury to find on the facts. Now, it is hardly conceivable that his mind would not be more or less influenced, in determining the first charge, after listening to the evidence on subsequent charges against the same individual. It would hardly be possible, in aiming at a conclusion in the first case, to dismiss

from his consideration impressions created by facts in the others, and, in this way, the accused would necessarily suffer prejudice. It is no answer to say, that this objection would equally apply to all subsequent trials after the first, even if he did decide the first before entering on the others, for at least in the first, the prisoner would not be fairly tried on the evidence in relation to that alone.

Another reason is found in the old and established course of procedure in criminal cases, that, when a prisoner is indicted, and on his trial for any offence, that trial must be proceeded with and finished, before he can be tried on some other indictment—in other words, in a court of common law, such a thing is unknown as to begin a trial against the same prisoner who is already on his trial for another offence—that is to say, to interject, as it were, one into the other, thus not only harassing the mind of the accused, but also prejudicing his defence.

Mr. Congdon relied strongly on the case of *Hamilton v. Walker* [1892], 2 Q.B. 25. Although, in a general way, that case supports the prisoner's contention here, it cannot be treated as a decisive authority on this question. There, two informations were laid before justices of the peace, charging the defendant (1), with delivering to a certain person indecent advertisements, and (2), with aiding and abetting this person in exhibiting the same. The justices heard the evidence on the first information, and without deciding on the defendant's guilt or innocence, heard the evidence on the second, and committed him on both. The court held that, as the evidence on the second charge was substantially the same as on the first, "each case ought to have been decided on the evidence given with relation to the particular charge, and, therefore, the justices were wrong in hearing the evidence on the second information, before deciding on the first, and both convictions were bad." Vaughan Williams, J., puts his reasons as follows:—

"I am of opinion that this course of procedure makes both convictions bad, the first, because the magistrates were bound to decide on the evidence given with respect to that



particular charge, and the second, because the defendant had a right to set up the defence that he had already been convicted, or acquitted, as the case might be, on the same facts."

This language may be read as applicable only to cases of a like character, where the facts which constitute the alleged offences are so connected as to make it indispensable that each charge should be tried and disposed of before the other is commenced. I am, however, of opinion, that, in Criminal trials before the County Court, when the judge is the jury, that rule should be followed in all its strictness. While it may be fairly argued that the mind of the judge, even though he gives his decision on the first charge, may be biased in succeeding trials against the same accused person, this is incident to the constitution of the court to which the defendant, it must be remembered, voluntarily submits his rights, but it forms no just reason for changing the ordinary course of criminal procedure, which can only be done by statute. For these reasons, I am of opinion all these convictions must be quashed, and a new trial granted.

MCDONALD, C.J., and RITCHIE, J., concurred.

WEATHERBE, J.—

Two objections were relied on to defeat the convictions. Firstly, the improper admission of evidence, namely, evidence of other offences called similar offences. And secondly, because each of the four cases was adjourned after trial, and verdicts or judgments by the County Court Judge were reserved in all the cases and delivered afterwards together.

Respecting the first objection, it is impossible to determine the question, because we have not been furnished with the evidence of the other offences, or anything in relation thereto. The learned judge, for the unusual course pursued in adjourning all these criminal causes for the purpose of trying the four indictments before him, and hearing all the evidence in each case before deciding any of such cases, relies on the inherent right to regulate the practice of his court, and

to arrange and conduct its business as appears to him to be most convenient, and as the ends of justice may seem to him to demand. He also, if this is not sufficient authority for his procedure, relies on sec. 777 of the Criminal Code giving the judge authority to adjourn a trial from time to time.

If a judge of the County Court had the extensive powers which are claimed in the decision appealed from, there certainly would be no necessity for sec. 777 of the Code, or, possibly, for many other sections. The criminal jurisdiction extended by the Dominion Parliament to the County Court permits the trial in that court, by the judge, of a prisoner who formerly could only be tried in the Supreme Court by a jury. The trial there, when that jurisdiction was conferred, must necessarily have been continued till a verdict of acquittal or conviction was reached, before the accused could be tried on other indictments, and this had always been the practice. Jurisdiction was conferred on the County Court in certain cases, upon the consent of a prisoner, to proceed with his trial in that court before the judge without a jury. The right to regulate the proceedings and practice in relation to that trial were not, except where specifically mentioned or conferred, given to the County Court. The proceedings and practice, I should say, as theretofore existing, except where altered by statute, were intended to be followed. The right of every person accused of crime, which would have been his if tried in the Supreme Court, remains secured to him when he consents to be tried in the County Court, except where such right is changed by law ; and his consent does not deprive him of any rights, or subject him to such proceedings as may, for the time being, seem to be most convenient or just to the County Court Judge.

If this view be the correct one, it only remains to determine whether the section of the Code relied on confers upon the judge the right of adjourning his verdict in order that the evidence of other criminal charges may be heard, or the right of adjourning the verdict or decision to such a period that he may necessarily hear the prisoner tried upon other indictments.

I have no doubt the adjournment provided for in the Code was to afford time for deliberation. There were other reasons, no doubt. Where a cause is tried by a jury, there is no adjournment for the purpose of deliberation by the judge before directing the jury, and the trial is not adjourned for the jury to make up their minds. The new departure of trying a prisoner before a judge without a jury, suggested, no doubt, the idea of delay—adjournment—in order that the judge might have time for considering the evidence and applying the law. I think if so great a change in the old practice as is claimed here were intended, the Legislature would have spoken. In effect this would be admitting evidence of other crimes without limit on the trial of an indictment. It would unnecessarily—I emphasize the word “unnecessarily”—embarrass a prisoner and his counsel, and the tribunal would be necessarily biased.

The trial of that prisoner for different crimes in succession before the same tribunal of fact, though each is determined before the next commences, would also be embarrassing, no doubt, but this is necessary. If time were required, after hearing evidence, for deliberation before the commencement of a fresh indictment, I will not say that adjournment might not be resorted to, but, in that case, the trial of the subsequent indictment should be postponed. The Lord Chancellor, it was held, was permitted to have jurisdiction to hear a case in which he was interested, because it was necessary—there was only one Lord Chancellor. This, I think, is the intention of the draughtsman of sec. 777 of the Code. This interpretation, I think, after discussion and deliberation, is more in consonance with the peculiar circumstances which have arisen than the view contended for on behalf of the Crown. It is a satisfaction to feel that it seems more in consonance with the ends of justice. There was a view which has some weight with me mentioned at the argument. Suppose, after the trial of an indictment before a jury and a verdict of guilty, upon a second indictment for the same offence the prisoner wished to plead the former conviction, is this not an

advantage formerly enjoyed, of which he would be deprived, if the practice now contended for were to be adopted?

HENRY, J.—

The prisoner Edward McBerny was tried in the above cases in the County Court Judge's Criminal Court for District No. 1, County of Halifax. The prosecution was, in each case, for a distinct offence. Several objections were made the subject of cases reserved in respect of each prosecution. Only two of these objections were taken at the argument, and only these need now be dealt with. One of these objections was that evidence which was received of other similar offences committed by accused was irrelevant and inadmissible on the trial of each of the charges. The other objection was that judgment was not pronounced in any one of the cases until the evidence in all had been concluded.

Evidence of collateral facts, otherwise inadmissible, is frequently admitted in criminal proceedings to show criminal intent. Thus, in an indictment for uttering forged paper or counterfeit coin, proof of prior or subsequent uttering, either to the prosecutor himself or to other persons, of other false paper or bad money, even where such other uttering is itself the subject of separate indictment, is admissible as being relevant to the question of guilty intent. *Taylor on Evidence*, secs. 328, 345 and 346 and cases there cited.

In the present case it was admitted at the argument that, in all the cases, the evidence was to the effect that the prisoner, in connection with some small purchase by him from the prosecutors respectively, managed, by trickery similar in all the cases, to obtain money of the prosecutors to which he had no right, and that these transactions took place about the same time. In this connection see especially *R. v. Long*, 6 C. & P. 179; *R. v. Cobden*, 3 Fos. & Fin. 833.

The other objection involves more difficulty, and is of much more importance. The learned judge's report shows the following facts:

The Hodge case was first taken up. All the evidence

being in, the closing addresses of counsel were made on Saturday afternoon, 11th July. On the following Monday, (13th), before the next case against the prisoner was proceeded with, his counsel, Mr. Congdon, asked for judgment in the previous case. The judge was not prepared to give and did not give any verdict, but proceeded with the Stamp Office case, the Ferry Ticket Office case, and the Lane & Connolly case, in the order named, hearing all the evidence, and the closing addresses of counsel, in each case before proceeding to the next, but not rendering a verdict in any until he heard the evidence in all. The last case was concluded, except, as to the verdict, on the afternoon of the 15th, and verdicts of guilty were rendered in all four cases on the morning of the 16th July.

The objection is, that each of the first three cases was not disposed of before another was commenced, and it is said that, in every case, the learned judge improperly had before him, not only the evidence in that case, but the evidence in the three other cases. There is little, if any, direct authority upon this matter. That is not to be much wondered at, because, in criminal proceedings at common law, all trials being by jury, such a question as the present could not arise. I am of the opinion however, that the solution of the difficulty is to be made by having regard to the relation of the statutory to the common law in this respect.

It is an elementary position that the incidents of criminal procedure under the common law are to be affected or modified by statute, only in so far as a clear intention to affect or modify such incidents is apparent. Some light on this question may be obtained by seeing how statutory inroads upon the common law system of criminal trials were first made. If we look at the history of the growth of the jurisdiction of justices, in and out of sessions, we find that a naked authority, "to hear and determine" offences implied a proceeding conformable to the common law mode of determination only, that is, by the common law method of inquisition and the verdict of a jury. See the historical introduction to Paley on Convictions, pp. 3 and 9; 4 Co., 74 b, and authorities there

referred to. This indicates the stability of the jury system and its incidents, and emphasizes the necessity of restricting the operation of statutory modifications of the law in this respect to the limits of express provisions.

Now, under the common law, the jury could not postpone their decision, and withhold their verdict, on the trial of a prisoner for one crime, until after they had heard the evidence brought forward in support of one or two or three other indictments against the same prisoner for other crimes, and then find him guilty of all the crimes charged. That being so, one naturally asks :—Where is the authority for subjecting a prisoner to different incidents in this respect from those which would prevail if he were being tried by a jury ?

The mere substitution of one judge for twelve jurymen cannot, of itself, involve the result that the facts may be tried under different conditions, when tried by the one man, from those under which they must be tried when tried by the twelve. Nor can I see that any weight in favor of the course pursued here is to be given to the fact, that one of the sections of the speedy trials scheme, (sec. 777) provides that the judge may adjourn any trial from time to time, until finally terminated. This section falls far short of authorizing what was done here, and there is obviously ample scope for it without giving it the effect contended for on behalf of the Crown. Moreover, the very existence of this express provision for the adjournment of a trial seems to me to afford good ground for the argument that, if it were intended that the judge should have the power to postpone his decision in one or more cases until he should hear the evidence in another or others, that unprecedented and unnecessary power would be expressly given, just as the much less important power of adjournment is expressly given.

While I think that this branch of the case might well be disposed of upon the ground already discussed, it may be well to point out that the course adopted by the learned judge might involve elements of substantial, as distinguished from merely technical, importance. Assume the case of a prisoner charged with three separate and independent crimes ; let us

say, highway robbery, burglary and ordinary theft. The evidence belonging to each of these cases would be irrelevant and inadmissible in each of the others, so that if the prisoner were first tried for the robbery, and that case were disposed of, the judge would have heard none of the other evidence, and therefore, could not be, as he ought not to be, affected by it unfavorably to the prisoner.

On the other hand, in the case of the theft, assuming it to be tried last, the judge would perhaps be better able to dismiss from his mind the evidence against the prisoner in the other cases, if, (as he might, if he dealt with each case separately), he acquitted him in these other cases before proceeding to try the charge of theft. These two views simply indicate the rights of a prisoner under the conditions suggested. The discussion might be further prosecuted to show the substantial nature of this departure from the course of common law trials, but, I prefer to rest my decision principally upon the ground that it is a departure for which there is no authority.

In *Hamilton v. Walker* [1892], 2 Q.B. 25; 67 L.T.N.S. 200; 61 L.J.M.C. 134; 36 Sol. Journal, 505; 40 W.R. 476; a case not absolutely in point, but in which, there being two informations, the justices, after hearing the first, proceeded with and heard the second, and then convicted the accused under both, the language of Pollock, B., and Vaughan Williams, J., shows that the first case should have been disposed of before the second was heard, and that each case should have been dealt with independently of the other. Pollock, B. said :—

“ It is true that the case does not come within the letter of Jervis’s Act (11 and 12 Vict., c. 43, ss. 10-14), but it is within the spirit of the criminal law, a well known principle of which is, that each case ought to stand on its own merits, and should be decided on the evidence given with relation to that particular charge.”

Vaughan Williams, J., used language to the same effect. The convictions were both held to be bad. The part of the

Jervis Act referred to by Pollock, B., provides that no information shall be for more than one offence or matter of complaint.

I am of the opinion that the prisoner was wrongly convicted in all four cases, by reason of the verdicts being withheld until the evidence in all was received by the learned judge.

MEAGHER, J., concurred.

*Convictions quashed.*

[COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE THE HONORABLE MR. JUSTICE WÜRTELE.

**THE QUEEN v. WEIR and others. (No. 4.)**

*Joint indictment—Separate trials—Practice—Option of Crown—Discretion of trial judge to direct separate trial—Grounds for ordering on defendant's application.*

1. Where several persons are indicted jointly, the Crown has the option of having them tried separately instead of together.
  2. Where several persons are indicted jointly, none of them can demand a separate trial as a matter of right.
  3. When the trial of the defendants jointly instead of separately would work an injustice to any of them, the presiding judge may, on due cause being shown, exercise his discretionary right to direct a separate trial.
- (Grounds upon which a separate trial is usually allowed, considered.)

MONTREAL, December 16, 1899.

WÜRTELE, J.—

An indictment was found and returned into Court on the 9th November, 1899, charging the defendants, William Weir, Edward Lichtenhein, Godfrey Weir and Frederick F. Smith, jointly, with having on the 27th May, 1899, at the city of Montreal, with intent to defraud and without lawful authority and



excuse, made and executed and signed, in the name of the Estate F. X. Beaudry, a certain promissory note in favor of the Ville Marie Bank for the sum of \$4266.21, by procuration of William Weir, and that they did, with the intent to defraud, make use of and utter such promissory note so signed by procuration by William Weir.

The defendants have all applied for separate trials.

The indictment sets up that at the date on which the promissory note was made and signed, William Weir was the president, Edward Lichtenhein was the vice-president, and the two other defendants, Godfrey Weir and Frederick W. Smith, were directors of the Ville Marie Bank, and the accusation would appear to be that William Weir actually made and signed the promissory note and that the other defendants, as members of the board of directors counselled and procured him to commit the offence and abetted him in its commission. Under these circumstances they are all parties to the offence which was committed by the making and signing of the promissory note by procuration, without lawful authority and with intent to defraud.

When several persons are indicted jointly, the Crown always has the option to try them either together or separately; but the defendants cannot demand as a matter of right to be tried separately.

Upon good ground being shown, however, for a severance, the presiding judge may, in his discretion, grant them separate trials.

The general rule is that persons jointly indicted should be jointly tried; but when in any particular instance this would work an injustice to any of such joint defendants the presiding judge should on due cause being shown permit a severance and allow separate trials.

The discretion of the presiding judge must not be exercised in a desultory or immethodical manner, but it must be guided and regulated by judicial principles and fixed rules.

The usual grounds for a severance are :—

(1.)—That the defendants have antagonistic defences ;

(2.)—That important evidence in favor of one of the defendants which would be admissible on a separate trial would not be allowed on a joint trial ;

(3.)—That evidence which is incompetent against one defendant, is to be introduced against another, and that it would work prejudicially to the former with the jury ;

(4.)—That a confession made by one of the defendants, if introduced and proved, would be calculated to prejudice the jury against the other defendants ; and

(5.)—That one of the defendants could give evidence for the whole or some of the other defendants and would become a competent and compellable witness on the separate trials of such other defendants.

Now, none of these grounds have been shown to exist in the present case, and there is no foundation for the exercise of any discretion, to either grant or refuse a severance ; under the circumstances a severance and separate trials cannot therefore be allowed.

The motion for separate trials is rejected.

*Motion dismissed.*

*Cook, Q.C., and Desmarais, Q.C., for the Crown.*

*MacMaster, Q.C., J. N. Greenshields, Q.C., Brown, Q.C., and Charles Archer, for the defendants.*

**Note :** *Separate trials on joint indictment.*

Whether or not a separate trial shall be granted on the application of a defendant is a matter in the discretion of the court. *R. v. Littlechild* (1871), L. R. 6 Q. B. 293. The accused persons are not entitled as of right to severance of trial ; *R. v. McConohy* (1874), 5 *Revue Legale* (Que.) 746, per Monk, J., Q.B., Montreal ; but the Crown is so entitled if the case is one in which a severance is practicable ; 2 *Hawkins, P.C. c. 41, sec. 8* ; 1 *Bishop's Crim. Prac.* 1034. A severance is not allowed in the trial of indictments for conspiracy or for riot. *Starkie's Crim. Plead.* 36. And separate trials were refused

**Note—Continued.**

where the charge was subornation of perjury; *R. v. Gravel* (1877), per Ramsay, J., Court of Queen's Bench, Montreal, (not reported) referred to in Taschereau's Criminal Code of Canada, page 696.

On an indictment of three persons jointly, for publishing blasphemous libels in certain numbers of a newspaper, two of them whose names were on it as editor and publisher respectively having already been convicted on a charge of publishing similar libels in another number of the paper, it was held that the third, whose case was that he was not connected with the paper at all, ought (on his application) to be tried separately, as his trial with the others might possibly prejudice him in his defence, especially as he desired to call them as witnesses, while it did not appear that his separate trial could at all embarrass the case for the prosecution as the prosecutor would be entitled to give any evidence in his power to fix the defendant with a joint liability for the acts of the others. *Reg. v. Bradlaugh* and others (1883), 15 Cox C.C. 217 (Coleridge, L.C.J.)

The trial judge has a discretion at the close of the case for the prosecution to submit the case of one of the defendants separately to the jury, if no evidence is to be given on his behalf; but he is not bound to do so. *The Queen v. Hambly*, (1859), 16 U.C.Q.B. 617, (Robinson, C.J., McLean and Burns, JJ.) When either the defendant or the prosecution desire to call one of the accused to give evidence for or against a co-defendant, a separate trial should be asked for. Where persons are jointly indicted but are tried separately, one of them is a competent witness against the other although the defendant so called has not been tried and has not been discharged on a *nolle prosequi*, and although he has not pleaded to the indictment. *R. v. Winsor*, 10 Cox C.C. 276.

Before the Canada Evidence Act, where prisoners were indicted jointly, and all pleaded not guilty, but having severed in their challenges, the Crown elected to proceed against three of them leaving the fourth to be tried *separately*, it was held that he was a competent witness on behalf of the other

**Note—Continued.**

prisoners ; *The Queen v. Jerrett* (1863), 22 U.C.Q.B. 499. (Hagarty, J. and Adam Wilson, J.) But if several prisoners jointly indicted were *jointly* tried and had been given in charge to the jury the former rule was that one of them while in such charge could not be called as a witness for another. *Reg. v. Payne* (1872), 12 Cox C. C. 118 (Court for Crown Cases Reserved).

Since the Canada Evidence Act 1893, every person charged with an offence is a *competent* witness whether the person so charged is charged solely, or jointly with any other person (sec. 4). That section does not make the accused person a *compellable* witness in circumstances under which he was under the prior law neither competent nor compellable, *ex. gr.* after being given in charge to the jury when being jointly tried with others on the same indictment. It, however, makes it possible for the accused to go into the witness box if he so desires, at the same time providing that the failure of the person charged to testify shall not be made the subject of comment by the judge or by counsel for the prosecution in addressing the jury (sub-section 2 of sec. 4).

Where persons are jointly indicted and one pleads guilty and is sentenced before the trial of the other is concluded, the prisoner so sentenced is rendered not only a competent but a compellable witness for or against the other ; *R. v. Jackson*, 6 Cox C.C. 525 ; *R. v. Gallagher*, 13 Cox C.C. 61.

Where the accused person becomes a witness, either by reason of his own election to give evidence or his obligation to testify as having been rendered a compellable witness, he is not excused from answering any question upon the ground that the answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person ; (Canada Evidence Act sec. 5, amendment of 1898) provided, however, that if the witness objects to answer upon that ground and if but for sec. 5 of the Canada Evidence Act he would upon such objection have been excused from answering the question then, although the witness shall be compelled to answer, yet the answer so given

**Note—Continued.**

shall not be used or be receivable in evidence against him in 'any criminal trial, or other criminal proceeding against him, *thereafter* taking place' other than a prosecution for perjury in giving such evidence; Canada Evidence Act sec. 5 (amendment of 1898). See also *The Queen v. McLinehy* (1899), 2 Can. Cr. Cas. 416.

[COURT OF GENERAL SESSIONS, COUNTY OF  
YORK, ONTARIO.]

BEFORE HIS HONOR JOSEPH E. McDOUGALL, COUNTY JUDGE,  
CHAIRMAN OF THE SESSIONS.

**THE QUEEN v. ALBERTIE.**

*Sunday Observance — Sale of ice cream — Victualling house —  
Works of necessity — Statutes in pari materiâ — Construc-  
tion—29 Car. II., c. 7—Lord's Day Act, Ontario, R.S.O.  
1897, c. 246, s. 1.*

1. The business of keeping a victualling house may be lawfully carried on on Sunday as a "work of necessity" within the exception contained in The Lord's Day Act of Ontario, and the keeper may supply any article which may fairly be considered food or victuals.
2. Ice cream is a food, and the keeper of a victualling house may lawfully sell the same to his customers on Sunday, whether or not other foods are supplied therewith.
3. The Lord's Day Act of Ontario is to be construed as in *pari materiâ* with the English statute, 29 Car. 2, c. 7, at one time in force in Ontario.

TORONTO, March 21, 1900,

McDOUGALL, Co. J.—

This is an appeal from a conviction under the Lord's Day Act, R.S.O. 1897, chapter 246.

The information reads,—“That John E. Albertie, being a tradesman carrying on business at the City of Toronto, in the County of York, on the 25th June, 1899, being the Lord's

Day, at the City of Toronto aforesaid, at his shop, 366 Yonge Street, in the said city, unlawfully did sell and publicly show forth and expose for sale certain goods and chattels and other personal property, thereby doing and exercising the worldly labor, business and work of his ordinary calling by selling, amongst other goods, two glasses of ice cream (the same not being the conveying of travellers or Her Majesty's mails by land or water, nor the selling of drugs and medicine, nor other works of necessity, nor works of charity) contrary to the form of the statute in such case made and provided."

The facts are as follows :—The defendant carries on an eating house or victualling house at 366 Yonge Street, Toronto. He keeps soda water and a small stock of candies, which, during the week, he disposes of to customers. His eating house is largely patronized by students attending the universities and colleges, many of whom get their meals by the week, which, of course, includes Sundays. The defendant swears that during the college season he boards as many as seventy-five students. For seven years past he has carried on this business, supplying meals to any applying on Sundays as well as week days. His place is kept open on Sundays only to supply meals. In addition to the ordinary bill of fare the defendant provides for his customers ice cream. It appears he had a fixed charge to the students and other boarders either by the week or meal, for meals according to a regular bill of fare. Ice cream is not included in the price of a meal, but would be extra. He states that some students instead of eating the meal in his eating house sometimes buy prepared food cooked on the premises and take it to their rooms. Other customers purchase food cooked by him such as cakes or pies. Ice cream also is sold to customers and eaten on the premises by persons who do not partake of a meal set out in the bill of fare. His business, however, is that of an eating house or victualling house. The sale of candies is only an incidental feature. In the college season his regular customers for meals would average as many as

one hundred and twenty-five daily. On Sundays he does not sell candies, but confines his business strictly to the supply of meals, and ice cream and soda water if asked for. On Sunday, 25th June, constables Ironsides and Guthrie entered the defendant's place of business and ordered two dishes of ice cream from the defendant, and, sitting down, consumed the same on the premises, paying for the same 10c. each. The defendant says that in June and July he had perhaps 15 or 20 regular customers daily for meals and four regular weekly boarders who got all their meals at his place. The defendant also holds a license from the city for carrying on a victualling house. An information was laid for the selling of ice cream on Sunday by the constables and a conviction was made for an alleged breach of the Lord's Day Act. The magistrate was to state a case for the opinion of the Superior Court. He declined this request on the ground that he had no power to do so, but noted on the depositions that in his judgment the case was one in regard to which the opinion of the Superior Court should be obtained. He fined the defendant \$1 and costs, it being understood that the case was to be treated as a test case and carried further.

An appeal was then taken to the Sessions. The appeal was heard before me on January 27th and evidence was called. The defendant gave his own testimony which established the facts above stated. Dr. Fotheringham, called by the prosecution, said that ice cream was undoubtedly a food. He said anything taken into the body which nourishes the body cells is a food. That soda water in a strict sense is also a food.

I will first consider the statutes bearing on the subject. 29 Charles II., chap. 7, is the starting point of legislation applicable to the observance of the Lord's Day so far as it affects Ontario. It is entitled an Act for the better observance of the Lord's Day, commonly called Sunday. (The title of R.S.O., c. 246 is "An Act to prevent the profanation of the Lord's Day.") The principal sections read as follows:—  
"That all the laws enacted and in force concerning the  
"observance of the Lord's Day and repairing to the church

“thereon be carefully put in execution; and that all and every person and persons whatsoever shall on the Lord's Day apply themselves to the observation of the same by exercising themselves thereon in the duties of piety and truth generally, publicly and privately, and that no tradesman, artificer, workman, laborer or other person whatsoever, shall do or exercise any worldly labor, business or work of their ordinary calling upon the Lord's Day or any part thereof (works of necessity and charity only excepted.)”

Section 3 :—“Nothing in this Act contained shall extend to the prohibiting of the dressing of meat in families or dressing or selling of meat in inns, cook shops or victualling houses for such as otherwise cannot be provided nor to the crying or selling of milk before nine o'clock in the morning or after four o'clock in the afternoon.”

Our Revised Statute 246 is practically a re-enactment of the principal sections of 29 Charles II., chap. 7, with some slight alterations or additions to the class of persons subject to its provisions. To the words “tradesman, workman, artificer, laborer,” are added “merchant, farmer, mechanic.” The words “publicly cry” are omitted; the words “exposed to sale” are changed to “to sell or publicly show forth or expose or offer for sale or to purchase.” The words “wares, merchandise, fruits, herbs, goods and chattels, whatsoever” are altered to “goods, chattels, or other personal property or any real estate whatsoever.” The words of the exception of the original Act “works of necessity and charity” are enlarged to read “conveying travellers or Her Majesty's mail by land or by water, selling drugs and medicine and other works of necessity and works of charity.” The proviso of the original Act excluding from its operation “the dressing of meat in families or dressing or selling of meat in inns, cook shops or victualling houses” is not repeated in our Act. It is quite clear that the Act of 29 Charles II., chap. 7, is an Act in *pari materiâ* with our Act. It was unquestionably in force in Canada until our 8 Victoria, chap. 45, when the Legislature of Canada passed the Act which is now R. S. O. 246. The only change in the language of section 1 of chap.



45, 8 Victoria, made in our present Revised Statutes, cap. 246, is the addition of the word "farmer" inserted in 1896. In *The Queen v. Barnes*, 45 U. C. R. 276, Hagarty, C. J., in effect holds that 29 Charles II., cap. 7, was in force in Canada at least down to 8 Victoria, chap. 45.

In *Palmer's case* (1784), 1 Leach C. C., 393 (3rd edition) where Acts of Parliament are in *pari materiâ* the twelve judges laid down the rule that such Acts "are to be taken together as forming one system and as interpreting and enforcing each other." Hardcastle on Statute Law at page 148 makes the following remarks: "Another rule with regard to the construction of statutes in *pari materiâ* is that any doubtful decision as to the meaning of one is, as Buller, J., said in *R. v. Mason*, 2 T. R. 586, "a sound rule of construction for the other."

In that case the question was whether an indictment under 30 George II., cap. 24, for obtaining money by false pretenses was good if it did not show what the false pretenses were. It appeared that it had been held in *R. v. Munos*, 2 Strange's Rep., 1127, that an indictment for procuring a promissory note by false tokens under 33 Henry VIII., cap. 1, was bad because it did not specify what the false tokens were. "30 George II., cap. 24," said Buller J., "only enlarges the description of the offence in the statute of Henry VIII. Both statutes are made in *pari materiâ* and whatever has been determined in the construction of one of them is a sound rule for the construction of the other. The judgment was arrested in the case in Strange because the indictment did not specify the false tokens; therefore, by the same reason, an indictment on 30 George II., cap. 24, which speaks of false pretences must state what the false pretences are, otherwise the indictment is bad."

This rule also appears to hold good with regard to a Colonial Act in *pari materiâ* with an English Act. Dr. Lushington in *Cotteral v. Sweetman*, 9 Jurist, 954, said: "I must construe an Act of New South Wales, as an Act in *pari materiâ*; and I conceive (though I know of no direct authority for the position) that an Act of a colonial legislature,

where the English law prevails, must be governed by the same rules of construction as prevail in England, and that English authorities upon an Act in *pari materiâ* are authorities for the interpretation of the Colonial Act. I think that is true as a general principle."

Where a colonial legislature re-enacts in substantially the same terms a British Act not originally applying to the colony, the adopted enactment is to be construed in the colony in the same way as the original enactment. The two are to be treated as being in *pari materiâ*. *Trimble v. Hill*, 5 App. Cas. 342. We thus have dicta which indicate the rule of construction in the two cases, first, where the English law originally applied to the colony and the colonial legislature passed an Act in *pari materiâ* with the original English Act, and second, where a colony not subject to the original English Act passes an Act substantially a re-enactment of an existing or former English Act.

The only difficulty arising in the present case in dealing with a victualling house is from the omission in R. S. O. 246, of the proviso or exception contained in 29 Charles II., cap. 7, relating "to the dressing of meat in families or the dressing or selling of meat in inns, cookshops or victualling houses." In *The Mayor of Portsmouth v. Smith*, L. R. 10 App. Cases 371, Lord Blackburn says, "Where a single section of an Act is introduced into another (subsequent) Act, it must be read in the sense which it bore in the original Act from which it is taken, and secondly, it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated into the new Act. I do not mean that if there was in the original Act a section not incorporated, which came by way of proviso or exception on that which was incorporated, that it should be referred to; but all others, including the interpretation clause, if there be one, may be referred to."

Our law, therefore, relating to the observance of the Sabbath depends upon a statute passed by our legislature

adopting substantially an English Act which had been in force in England for 168 years, and in Canada for over 50 years, before any legislation of our own upon the subject. Under the original Act the ordinary work carried on in private families and the business carried on in inns, cook-shops and victualling houses were exempted from the prohibition of the statute. It would appear that the earlier English legislature considered that the ordinary work performed in families and by inn-keepers, cook shops and victualling houses might not be within the exception in the first section of the Act as works of necessity and charity, and it therefore inserted a special proviso in the Act, declaring that nothing in the Act contained should be held to extend the prohibition to such work. It is not necessary in the strictest sense that food should be prepared on Sunday for a private family. It could easily and equally well be prepared on the Saturday, and the family could thrive satisfactorily and sustain life by eating cold victuals on Sunday. The man who lived in rooms, and had no cooking arrangements could provide for his wants by buying cooked food required by him for Sunday on the day previous. The same reasons would apply to a hotel. A strict construction of the word "necessity" would not require hot meals to be served to the guests on Sunday; cold ones, though perhaps not so palatable, would prevent any actual suffering on the part of such guests. The livery stable keeper or coach proprietor, the driver of the stage coach, according to decided cases, could ply his ordinary calling on Sunday under the decision in *Sandeman v. Beach*, 4 B. & C. 96, the cabman under *The Queen v. Somers*, 1 Can. Cr. Cas. 46, and until 1896 (59 Vic., Ont., cap. 62) the farmer under *R. v. Cleworth*, 4 B. & S. 927; but the private family, the inn, the boarding house and the eating house, on a strict construction of our statute, might become law breakers if they did the usual work necessary to provide hot meals or afforded facilities for the public to procure food or sustenance on Sunday. That is doubtless the logical conclusion if the proviso contained in Charles II.,

chap. 29, is not to be read into our statute, or if its legal effect is not considered in interpreting our own statute.

The effect of an excepting proviso according to the ordinary rules of construction is to except out of the preceding portion of the enactment something which but for the proviso would be within it. In *Mullins v. Treasury of Surrey*, 5 Q. B. D. 150, Lush, J. says, "When one finds a proviso to a section the natural presumption is that but for the proviso the enacting part of the section would have included the subject matter of the proviso." In that case, however, the Divisional Court, in which Mr. Justice Lush gave judgment, in construing the Act in question entirely rejected the proviso, a course admitted by the court to be a very strong thing to do.

It must, probably, be assumed that in adopting the provisions of 29 Charles II., cap. 7, our legislature intentionally omitted to re-enact the proviso. Our Act has therefore to be construed without it and its omission compels the court to place a meaning upon the words "works of necessity." Necessity, or rather what constitutes a work of necessity, depends to a great extent upon circumstances. It cannot be determined by any fixed rule, and must therefore be dealt with in each particular case rather as a question of fact than of law. In an American case *Johnson v. Commonwealth*, 22 Pa. St. 108, Woodward, J. speaks as follows :—"It is impossible to lay down any general rule as to works of charity and necessity. If the works enumerated in the proviso of the statute be taken as a legislative sample of works of necessity, it might be said in general that to supply the ordinary demands of our physical needs and to relieve from situations of peril and exposure are necessary acts which incur no blame, . . . still the exigencies of human life which demand works of charity and necessity are so numerous and so diversified by attending circumstances as to defy classification and to forbid the attempt to prescribe a general rule." In another case, *Commonwealth v. Simpson*, 97 Mass. 409, Hoar, J., said "To save life, or prevent or relieve suffering, and this in the case of animals as well as man, to prepare

needful food for man and beast, to save property as in the case of fire, flood or tempest, or other unusual peril, would unquestionably be acts falling within the exception."

It is a necessity to provide and prepare food in the private family on Sundays as well as week days. There are others who have no home or family and whose habit and custom it is to have others provide and prepare food for them. I think that such preparation and such supplying of food is a necessity also. It must be further borne in mind that R.S.O. 246 is a penal statute and must therefore be construed strictly. Blackstone defines this rule in very clear language. "The law of England," he says, "does not allow of offences by construction, and no cases shall be holden to be reached by penal laws but such as are within both the spirit and the letter of such law." The modern rule has probably grown to be a little more liberal, and in *Lyon's Case*, Bell C. C. 38, at page 45, the court says: "A hundred years ago the statutes required to be perfectly precise, and resort was not had to a reasonable construction of the Act, and criminals were thereby often allowed to escape. This is not the present mode of construing Acts of Parliament. They are now construed with reference to their true meaning and real intention of the Legislature." The punishment will not be extended to cases not clearly embraced in the Act. In *Dickinson v. Fletcher*, L.R. 9 C.P. 7, Brett, J., thus expresses the modern rule for the construction of penal statutes: "Those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that under the circumstances it has been incurred. They must fail if the words are merely equally capable of a construction that would and that would not inflict the penalty."

Some light may be thrown on the subject under consideration by examining one or two cases decided under the English Lord's Day Act. Mr. Justice Buller in the case of *R. v. Younger*, 5 T.R. 449, in commenting on the provisions of 29 Charles II. cap. 7, states that "The words of the statute are vague and indefinite. First there is an exception as to 'works of necessity and charity'; then there is a proviso

that the Act shall not extend to 'inns, cookshops or victualing houses for such as otherwise cannot be provided.' Both these expressions are extremely loose and no certain line can be drawn as a pure question of law."

The question involved in *R. v. Younger* was whether a baker was properly convicted for having baked dinners on Sunday — admittedly for people who could otherwise have provided for themselves. Mr. Justice Grose in the same case thus deals with the meaning of the Act, "The question is not whether baking for this or that man is a trade, but whether the trade of baking carried on in this way be a work prohibited by the statute. . . . The crime imputed to the defendant is having baked dinners on a Sunday. There cannot be any distinction between dressing dinners for the poor and the rich, as far as respecting the baker. It is admitted that dinners for the former may be dressed, then is it to be taken that it would be no crime to bake for a man who is too poor to bake at home, and yet that the baker must be convicted on a penal law for baking for another person who happens to be able to bake at home, a circumstance of which the baker cannot be cognizant? The case therefore seems to me to come within the proviso relating to cook shops." Lord Kenyon, C. J., in the same case says, "I am for the observation of the Sabbath, but not for a Pharisaical observation of it. But must the laboring part of the community who are entitled to some indulgence for the labors of the past week fare harder on that than any other day? They must be fed on that day as many of them have not the means of dressing their dinners at home; and those who have will, if this defendant be convicted, be prevented from observing the Sabbath. That day will be better observed if the construction put upon the law in *R. v. Cox* be now adopted than if we over-ruled that determination and adjudge this to be an offence. That decision falls within the reason of the law; and I am glad to find that it is an authority for us at present." The conviction was quashed. See also *R. v Cox*, 2 Burr. 786.

In the case of *R. v. Ivens*, 7 C. & P. 213, where an indictment was preferred against an innkeeper for refusing to receive a person on Sunday night into his inn, the innkeeper insisted on knowing where the applicant was from and his name, etc. Lord Coleridge in charging the jury said : " The law is founded in good sense. The inn-keeper is not to select his guests. He has no right to say to one you shall come to my inn, and to another you shall not, as everyone coming and conducting himself in a proper manner has a right to be received, and for this purpose inn-keepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers and supplying them what they want." And again, " In the case it further appears that the wife of the defendant had a conversation with the prosecutor in which she insisted on knowing his name and abode. I think that an inn-keeper has no right to insist on knowing any of those particulars, and certainly you and I would think an inn-keeper very impertinent who asked either one or the other, of any of us." In another part of his directions to the jury, Lord Coleridge stated : " the only valid excuse that the inn-keeper could make for not receiving a guest was that his inn was full." The inn-keeper was duly convicted and fined 20 s. for not receiving the prosecutor who applied for lodging at the inn between 11 and 12 o'clock on Sunday night.

After careful consideration of the whole case I cannot attribute to the Legislature of 1845 an intention to make the law more strict in Canada than it had been in England. It used more perspicuous language in defining the work or labor prohibited and to the classes of persons to be affected by the statute. They added the words " merchant and mechanic " and later " farmer," but it cannot be conceived that, by omitting the proviso, they intended that private families, inn-keepers, cook shops and victualling houses should be taken to be included in the prohibited clause. Modern habits and customs especially in towns and cities have become exacting in the matter of daily comforts. The modern citizen is accustomed, in the matter of eating and drinking, to substantially the same conditions on Sunday as on week days and

this has become, in a modified sense, a necessity. In the artificial life developed in cities a large number of people depend on other persons to supply them with food and drink on all days of the week. Hundreds, probably thousands, of persons in a city as large as Toronto, eat all their meals outside of the places in which they lodge, and to hold that the persons who cater to such people for their three meals a day are to be prohibited from providing such meals to them on Sunday would require more explicit and emphatic language on the part of the Legislature. If the absence from our statute of the proviso of Charles II. cap. 7, makes it a penal offence for domestic servants under monthly contract to cook her master's Sunday dinner or for the boarding house keeper or eating house keeper to pursue their ordinary calling on Sunday of furnishing three hot meals a day to their lodgers or boarders, or meals to casual customers, it will be a surprise to the public and to the law makers. If on the other hand the eating house keeper is within the exception of the statute because carrying on a work of necessity, is it reasonable under such a construction to determine what his customer shall eat? Is he to be excused from the penalty if he furnishes to one customer a cut from a hot joint, some vegetables and a cup of tea or coffee, but is liable to the penalty should he supply to another customer (in his eating house) a dish of ice cream and a glass of water, or a biscuit and a glass of milk? If it is lawful for an inn-keeper or an eating-house keeper to supply meals on a Sunday, is he bound to catechise his customers and satisfy himself before serving them that they are hungry and need food to refresh them, or must he refuse them any trifling refreshment short of full course dinner? Must he, in other words, satisfy himself in the first place of the necessity, and, being assured of that, must he and not the customer, determine what the customer is to be allowed to eat?

It was suggested on the argument before me that possibly the law would not prevent an eating house keeper from supplying meals on Sunday to regular weekly boarders, but on the other hand it was urged with great confidence that it was



distinctly illegal to provide or sell meals to a casual customer however great his want. That it was improper for the eating house keeper to open his front door to do business with the general public, and the question of necessity could not arise in the absence of contractual obligation. I entirely dissent from this view. I look upon an inn-keeper and a victualling house keeper as being within the same protection and possessing similar privileges. An inn is defined in Stroud (Judicial Dictionary) as "A house in which travellers, passengers, wayfaring men and other such like casual guests are accommodated with victuals and lodging and whatsoever they reasonably require for themselves and horses at a reasonable price." A victualling house is defined as "A house where persons are provided with victuals but not lodging." Victuals are defined as comprising everything that is food for man, and everything which when mixed with something else, constitutes such food. See *R. v. Hodgins*, 10 B. & C. 74. The victualling house keeper and inn-keeper provide for the public, the first, food or victuals, the second, food, victuals and lodging. Each are equally necessary to the community, not alone for six days in the week, but for the whole seven days. Whether the customer is rich or poor, a boarder by the day or week, or a casual visitor, I think can make no difference. If then it be lawful for an eating house keeper to carry on his ordinary business on the Lord's Day as a work of necessity, then I am of the opinion that on the question as to who he shall supply or what he shall supply, so long as it can fairly be considered food or victuals in any one of their numberless variations, the keeper is not punishable for a breach of the Lord's Day Act. If he is protected in supplying meals, he is protected in suiting the taste of his customers as to the article of food required. As I have said before in an earlier part of this opinion, I am satisfied from the evidence that the defendant was carrying on, on Sunday the 25th of June, the date of his alleged offence, strictly and exclusively his business as a victualler. His candy department, if the small stock he carried can be so described, was closed to the public.

I am of the opinion, under all the circumstances of the case, that the supplying the constables with the ice cream was the supplying a refreshment in the nature of a light meal in the ordinary course of his business as an eating house keeper or a victualling house keeper, and was not an offence under the statute.

It may be interesting to note that in England under 34-35 Vic., chap. 87, no prosecution for an offence under 29 Charles II. chap. 7 can be prosecuted except with the written consent either of the Chief of Police of the Police District, or of two justices, and, if obtained in the latter manner, the case cannot be heard before the justice giving the consent.

The conviction will be quashed, but, under the circumstances of this appeal being treated as a test case, without costs.

*Conviction quashed.*

*T. C. Robinette*, for the appellant.

*J. A. Paterson* and *A. E. O'Meara*, for the respondent.

## [COURT OF QUEEN'S BENCH, QUEBEC.]

## DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J., IN CHAMBERS.

## RE JOHN DOE.

*Finding sureties to keep the peace—Commitment in default—  
Record of default—Recital in warrant—Cr. Code 959—  
Code form YYY.*

1. When a justice of the peace makes an order under Cr. Code section 959, requiring a person to give security to keep the peace, he must fix the amount of the recognizance to be given.
2. A justice's order that the accused give security to keep the peace for one year, but not fixing any amount nor a term of imprisonment in default, will not support a commitment thereunder.
3. A warrant of commitment under Cr. Code section 959 and form vvy, can only be issued after the defendant's refusal or neglect to furnish the required security, proved and recorded subsequently to the order requiring the security, and it must recite such refusal or neglect.

MONTREAL, August 9, 1893.

WÜRTELE, J.—

On the 27th July, 1893, the petitioner was convicted by a justice of the peace of having committed an assault on one G., and was adjudged to pay a fine of \$1.00 and the costs of the case, and in default of immediate payment, to be imprisoned for a term of eight days. It was, at the same time, adjudged that he should give security to keep the peace for the term of one year.

Failing to pay the fine and costs, he was committed to the common gaol, and having served the term of eight days to which he had been sentenced, he now demands to be discharged.

The warrant of commitment issued in the first instance, and of which a copy was given to the petitioner, merely orders the keeper of the common gaol to keep him for the term of eight days, but another warrant of commitment was subsequently issued and delivered to the gaoler, which

directed him to keep the petitioner for the term of eight days, "and until the said John Doe do furnish good and sufficient securities as hereinbefore adjudged."

The only ground I have to examine is whether the warrant of commitment authorizes the petitioner's detention after the expiration of the term of eight days?

The justice of the peace had the power to require the petitioner to give security to keep the peace for a term of twelve months, and in default of so doing to be imprisoned for that space of time; but the question is whether in the present case the justice of the peace has complied with the requirements of the law, and whether the second and amended warrant of commitment can legally authorize the petitioner's detention beyond the term of eight days?

The case is governed by article 959 of the Criminal Code, and paragraph 4 provides that the justice of the peace may order that the person required to give security be imprisoned for a term not exceeding twelve months if he refuses or neglects to do so.

Then the form of a warrant of commitment *vyv* is given, and this form contains the following recital:—

"Whereas, the said A. B., having been required by me  
"to enter into his own recognizance in the sum of \$.....,  
"with two sufficient sureties in the sum of \$..... each, to  
"keep the peace and be of good behaviour towards Her  
"Majesty and her liege people, and especially towards the  
"said C. D., has refused and neglected and still refuses  
"and neglects to find such sureties."

When, therefore, a justice of the peace requires anyone to give security to keep the peace, he must fix the amount of the bond to be given and order him to be imprisoned for a term to be mentioned, not exceeding twelve months, in case he should refuse or neglect to give such security. The justice of the peace must afterwards establish and record the defendant's refusal or neglect to furnish the security, and he can only issue his warrant of commitment after such refusal or neglect.

In the present case these requirements have not been observed. The conviction requires the petitioner to give security to keep the peace, but does not fix the amount, nor does it order his imprisonment in default of his giving it ; it does not appear that the petitioner either refused or neglected to give the security, and, in fact, he was never told for what sum he had to find sureties ; and the warrant of commitment does not state that he had refused or neglected to find sureties nor does it mention the amount for which the security should be given, and yet it commands the gaoler to detain the petitioner "until he do furnish good and sufficient securities."

The warrant of commitment is, therefore, illegal, and the petitioner cannot be held under it any longer, and I therefore order that he be forthwith discharged.

But as it appears to me from the record that it is probable that the petitioner may again molest the complainant unless he is bound over to good behaviour, I now require him to forthwith enter into his own recognizance in the sum of \$50.00 to keep the peace during twelve months, and to be imprisoned for that term should he refuse or neglect to do so.

The formal judgment is as follows :—

" Upon reading the return of the within writ, after hearing  
" J. L. Archambault, Esquire, one of Her Majesty's Counsel  
" learned in the law, acting for and on behalf of the Hon-  
" ourable the Attorney-General of the Province of Quebec,  
" and the within named John Doe, it is ordered that the  
" same be filed ; and it appearing to me that the commitment  
" to the said return annexed, is insufficient in law to warrant  
" the detention and imprisonment of the said John Doe, it is  
" ordered that he be and he is hereby discharged ; and it is  
" further ordered that the said John Doe do furnish good  
" and sufficient security, himself in the sum of fifty dollars,  
" to keep the peace towards all Her Majesty's subjects, and  
" more particularly towards one G., of the city and district  
" of Montreal, for the term and space of twelve months, and  
" in default of furnishing such security as aforesaid, that he

"be imprisoned in the common gaol of this district for and  
"during the term and space of twelve months."

*Petitioner's discharge ordered.*

*J. L. Archambault, Q.C., for the Crown.*

The petitioner in person.

**Note :** *Finding sureties to keep the peace—Commitment in default—Formalities of.*

See also *R. v. John McDonald* (N.S.), 2 Can. Cr. Cas. 64.

## [COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE KILLAM, C.J., DUBUC, AND BAIN, JJ.

## PROCTOR v. PARKER.

*Summary Conviction—Recital of adjournments of hearing—Presumptions—Onus of proving regularity—Adjournment in absence of accused—Imprisonment in default of paying fine—Release from—Validity of as consideration for a promissory note—Fires Prevention Act (Man.)—Cr. Code 853, 857 (1)—Code Form WW.*

1. A conviction in the form prescribed by the Criminal Code is not bad because it also contains recitals showing certain adjournments of the hearing before the justice but not showing that no adjournment had been made for a longer period than the eight days allowed by Cr. Code section 857, sub-section (1), although more than three months had elapsed from the commencement to the end of the proceedings.
2. The hearing before a justice trying a person for an offence punishable on summary conviction may be adjourned from time to time under section 853 of the Code, although the accused be not present, provided the adjournments are made in the presence and hearing of his solicitor or agent.
3. Release from imprisonment in default of payment of a fine imposed on conviction for an offence against The Fires Prevention Act, R.S.M., c. 60, may be a good consideration for a promissory note to secure payment of the fine and costs, given to the parties interested in the penalty.

ARGUED: May 2, 1899.

DECIDED: June 13, 1899.

Appeal from a judgment of a County Court in favor of the plaintiff in an action upon a promissory note made by one Luke W. Parker in favor of the defendant and endorsed by the latter in blank. The dispute note denied the indorsement and presentment for payment, and set up that the plaintiff was not the holder of the note, want of consideration, and that the indorsement was obtained by fraud, duress and undue influence.

Luke W. Parker was charged, upon the information of the present plaintiff, with an offence under The Fires Prevention Act, R.S.M., c. 60, s. 4, as amended by 58 and 59 Vic. (Man.)

c. 14, ss. 1, 2. Subsequently, after a trial before a justice of the peace, it was claimed that he was convicted, fined \$125 and ordered to be imprisoned in default of payment. The document alleged to be the conviction bore date the 13th July, 1895. The fine not having been paid, a warrant for the arrest of Luke W. Parker and for his imprisonment as adjudged was issued, and he was arrested under it and brought to Winnipeg from his home which was twenty miles distant. In order to get his release, it was agreed between him and Proctor's solicitor that he should give his promissory note for \$135 indorsed by his father, the present defendant. Luke Parker signed the note and a cheque was given by his solicitor for \$35 and one by the father for \$100 as security that the note would be indorsed, and he was then released. The indorsement was subsequently made by the defendant and the cheques given up. In making this settlement the Parkers acted under the advice and with the assistance of a solicitor. The note thus indorsed was the one sued on. It was held for a considerable time by the Provincial Treasurer, who was entitled to half the penalty and who gave it back to the plaintiff for suit.

WINNIPEG, May 2, 1899.

*C. P. Wilson* for defendant: The conviction before the justice of the peace was void because the summons was adjourned *sine die*, and taken up again, when it really had lapsed, in the absence of the accused who was never present. Service by any but a constable was bad. The evidence shows the original summons was not served by a constable, but by the plaintiff. Defendant could not move to quash the conviction as he had no notice of it for over 6 months. The conviction states facts which show it is void, unless other facts are shown which were not shown. The conviction shows the summons was issued on 9th April and two adjournments, whereas there should have been many more. Where two are specifically mentioned the Court cannot assume others: *The Queen v. Morse*, 22 N.S.R. 298. There was no return of the



conviction, the justice of the peace retained same until the trial of this action. As to altering conviction : *Jones v. Williams*, 46 L. J. M. C. 270. It should be presumed from the non-return that there was no conviction signed before the note was given. As to form of conviction : *Reg. v. Kennedy*, 17 Ont. R. 160.

*W. H. Culver, Q.C.*, and *J. R. Haney* for plaintiff : The onus of showing want of consideration is on the defendant. If the conviction were good there was a consideration. The onus is on defendant to show it was void. As to duress, see plea in *Bullen & Leake's Precedents*, 565, 566. The findings of the County Court Judge are not attacked and the evidence supports them. There was no fear when the note was given. It was given voluntarily. Luke Parker had been discharged when the note was given. A parent can set up duress in respect of a child only if he acts under duress : *Leake on Contracts*, 350 ; *Ormes v. Beadel*, 2 D. F. & J. 333 ; *Addison on Contracts*, 118. Duress must be an act of a party himself, or imposed by his knowledge or taken advantage of by him. The fine was payable to the Provincial Treasurer : *R. S. M.*, c. 60, s. 25 ; 58 *Vic.*, c. 14, s. 7. There is no pretence of the Provincial Treasurer being guilty of duress. If the conviction is good on its face, it cannot be questioned in a collateral proceeding : *Amer. & Eng. Ency. of Law*, 1st ed. vol. 12, p. 275. *Crepps v. Durden*, 1 Sm. L. C. 722. The fact giving jurisdiction was the summons served and the accused appearing by counsel. *Code Form YY.*, *Crankshaw's Criminal Code*, 731. It contemplates appearance by attorney or counsel. As to impeaching conviction : *Haacke v. Adamson*, 14 U.C.C.P. 201 ; *Sprung v. Anderson*, 23 U.C. C.P. 152. The conviction is regular on its face. As to a minute of the conviction : *Criminal Code*, s. 658. As to enlargements, *Code s. 857*.

WINNIPEG, June 13, 1899.

The judgment of the court was delivered by

KILLAM, C. J.—

The conviction referred to in this case is in the Form WW to The Criminal Code, with the addition, at the end, of the words :—

“The said Luke W. Parker, the defendant, was duly and personally served with a summons duly issued on the ninth day of April, one thousand eight hundred and ninety-six, being the same day that the complaint was duly made herein by the said complainant, John W. Proctor, and said defendant, Luke W. Parker, by his solicitor and agent, appeared upon the return of said summons at the time and place appointed, and said solicitor and agent also appeared when same came on for hearing before me and asked for a further adjournment which was granted at his special request ; said defendant was subsequently specially summoned to appear before me on the first day of taking evidence, when his said solicitor and agent appeared for a short time, but the defendant did not personally appear at the hearing.”

Without the addition to the statutory form the conviction would have been perfectly good on its face. The statutory form does not show that the accused was summoned or whether he appeared. The forms of orders YY, ZZ and AAA, which do state service of summons, and appearance or non-appearance according to the circumstances, are not applicable. It does not appear to me that the addition invalidates the conviction. I cannot draw from the statement of facts, which were not required to be stated, any inference that other circumstances necessary to the jurisdiction of the magistrate did not exist. Ordinarily, of course, the jurisdiction of an inferior court should appear upon the face of its proceedings ; but it is sufficient to follow the statutory form ; and the addition of statements not showing want of jurisdiction does not seem to invalidate it.

It can probably be implied from the portion of the conviction cited, that the accused was not present during the proceedings, but section 853 of the Criminal Code authorizes the magistrate to proceed in the absence of the accused if he be duly summoned.

It is argued that the conviction shows by necessary intendment that there was at least one adjournment of the proceedings for a longer period than the eight days limited by section 857, sub-section (1), of the Criminal Code, since, at most, two adjournments are stated. But, while it appears that the summons issued on the 9th April and the conviction was made on the 13th July, the date of the first hearing is not given; and, further, I do not think that any inference as to the actual number of adjournments can properly be drawn from the statement of some.

Upon the evidence I agree with the finding of the learned Judge of the County Court, that it is not proved that the necessary adjournments within the statutory limits to preserve jurisdiction were not made. I agree, also, with his view of the statute, that these could be made by the magistrate in the absence of the parties, section 857 sub-section (1) only requiring them to be stated in the hearing of those parties, solicitors or agents who are in fact present. Parties who do not see fit to appear must ascertain the dates to which proceedings are adjourned, or disregard them at their peril.

I take the conviction as binding and the arrest of Luke Parker as lawful. The imprisonment was only for the purpose of enforcing payment of the fine. There was nothing unlawful or improper in the release in consideration of such cheques, notes or other securities, as the parties interested in the penalty were willing to accept in lieu of cash. The Provincial Treasurer is shown to have adopted the settlement to some extent. The onus of proving want of consideration was upon the defendant, and any assent of the Treasurer or authority in him to accept the note should be presumed. Indeed, the release of Luke Parker was ample consideration for the note. A question as to proof of presentment is raised. I do not think that it is now open to the defendant. It seems not to have been raised at the trial. If it had been, the Judge might have given an opportunity to supplement the evidence. Presentment may be very readily waived, and

such a course should be taken as a waiver of any more strict proof of it. In this view I do not consider the validity of the objection.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

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[COURT OF QUEEN'S BENCH, QUEBEC.]

DISTRICT OF MONTREAL.

BEFORE THE HONORABLE MR. JUSTICE WÜRTELE.

**SUPERIOR v. CITY OF MONTREAL.**

*Jurisdiction—Appeal not a matter of procedure—Municipal license—Pawnbroker—Montreal City Charter, art. 503—Cr. Code 840, 879.*

1. A right of appeal is not a matter of procedure under article 503 of the Montreal City Charter, which enacts that the provisions of part LVIII. of the Criminal Code shall apply to prosecutions under the charter "as regards the mode of procedure" therein; and there is consequently no appeal from the Recorder's Court of Montreal to the Court of Queen's Bench, from a conviction for carrying on the business of a pawnbroker without a license.

MONTREAL, January 3, 1900.

WÜRTELE, J.—

Under the charter of the City of Montreal, the council has the right to impose a special annual tax, not exceeding \$200, on all pawnbrokers carrying on business in the city, and to levy the same in the form of an annual license. The council also has the right to make provisions for enforcing the collection of such special tax, and the taking out of the license, and for that purpose to impose a fine not exceeding \$40, or an imprisonment not to exceed two months. The council on the 8th May, 1899, passed a by-law, under the authority conferred upon it in the charter by the Legislature of the Province

of Quebec, which ordains that no person shall do business in the city as a pawnbroker without having previously obtained a license from the city, and without having paid for such license the sum of \$200, being the amount of the annual special tax, which it is allowed under the charter to impose on that calling; and it is further ordained by the by-law that every person who infringes its provisions shall be liable to a fine not to exceed \$40, and in default of immediate payment of the fine to an imprisonment not to exceed two months.

The appellant, Mr. J. H. Superior, is a pawnbroker, who was carrying on business as such in the City of Montreal, and he was prosecuted before the Recorder's Court for having done so on the 18th July, 1899, without having previously obtained the necessary license, and without having paid the annual special tax of \$200; and on the 1st of August, 1899, he was convicted for his infraction of the by-law and was condemned to pay a fine of \$25, and in default of immediate payment to be imprisoned for two months.

The appellant then paid the fine under protest, and at the same time appealed from the conviction to this court.

When the case was called, the respondent the City of Montreal, raised a preliminary objection, and submitted that the matter which formed the subject of the accusation was one which fell under the exclusive jurisdiction of Provincial Legislatures and contended that no appeal existed inasmuch as the Legislature of the Province of Quebec had not given any right of appeal from convictions under the provisions of the charter of the City of Montreal. The appellant on the other hand maintained that the right of appeal had been given by article 503 of the charter, alleging that it enacted that in all prosecutions instituted before the Recorder's Court, the provisions of part LVIII. of the Criminal Code, respecting summary proceedings before magistrates would apply, and that section 879 of that part of the Criminal Code gave a right of appeal to this court to any person who might think himself aggrieved by a summary conviction.

The question which I am called upon to decide is whether there is an appeal to this court from a conviction in the

Recorder's Court on a matter which is under the exclusive legislative authority of the Legislature of the Province of Quebec, under the provisions of article 503 of the charter?

The right of appealing is not a common law right; it only exists when it is given by statute, either expressly or by necessary implication. No court has an inherent power to entertain an appeal from the judgment or conviction of another court, and the authority and right to do so must be specially conferred, and the procedure to be employed must be distinctly laid down.

There is no general statute of the Province of Quebec which grants the right to appeal from summary convictions rendered under provincial legislation to the Court of Queen's Bench on its Crown Side, but the appellant contends that the right of appealing from convictions of the Recorder's Court in matters which arise under the charter of the city has been expressly conferred by article 503, which makes part LVIII. of the Criminal Code applicable to all prosecutions before that court in penal cases, and which in fact, according to him, incorporates the provisions of that part of the Criminal Code in the charter; but it suffices to read article 503 to see that it is not as broad as is contended. The provisions of part LVIII. are only extended to prosecutions instituted before the Recorder's Court under the charter "as regards the mode of procedure in such prosecutions to final conviction or judgment, the execution and carrying out of such conviction or judgment, and generally as to all rules imposed upon magistrates for such objects," and so the provisions specified really only apply to and affect matters of procedure. Now the right of appealing is not a matter of procedure, but is a substantive right in itself; to give effect to this right, and to exercise it, a mode of procedure has to be employed, but the right itself is a power and not procedure. The article of the charter cited by the appellant does not, consequently, confer the right of appeal from the Recorder's Court to this Court.

But the appellant further contends that the case is a penal one, and therefore that under section 879 of the Criminal

Code, which enacts that any person who thinks himself aggrieved by a summary conviction may appeal to the Court of Queen's Bench on its Crown Side, he has a right of appeal. The matter in the present case is a penal one under provincial legislation, but it does not come under the criminal law of the Dominion, which is under the exclusive legislative authority of the Parliament of Canada. Now part LVIII. of the Criminal Code which grants the right of appealing from a summary conviction only applies under the express enactment contained in section 840 to cases respecting offences over which the Parliament of Canada has legislative authority and for which summary convictions may be rendered against offenders who have violated the criminal law of the Dominion. It does not apply to penal cases which arise from and are governed by provincial legislation. If article 503 of the charter had incorporated in its provisions the whole of part LVIII. of the Criminal Code it might be inferred by implication that the right of appealing was conferred; but this cannot be implied under article 503 of the charter as it has been drafted and passed, as it limits its application solely to matters of procedure.

I am of opinion that there is no right of appeal in the present case and it is therefore dismissed, with costs.

*Appeal dismissed.*

*Saint-Pierre, Q.C., and James Crankshaw, for the appellant.*

*Cooke, Q.C., for the respondent.*

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE THE HON. SIR WILLIAM RALPH MEREDITH,  
CHIEF JUSTICE OF THE COMMON PLEAS, AND THE  
HON. MR. JUSTICE ROSE.

## THE QUEEN V. SMITH.

*Summary conviction—Invalid municipal by-law—Enacting clause more extensive than statute authorises—Recital of exceptions under proviso of statute—Negating exception in conviction—Amendment—Ontario Municipal Act, R.S.O. 1897, c. 223, s. 583 (14).*

1. A summary conviction under the Ontario Municipal Act for peddling without a license is bad if the municipal by-law, although reciting the exceptions contained in the proviso of sec. 583 (14), is not so limited as regards its enacting sections.
2. A conviction under the Ontario Municipal Act for peddling without a license is bad if it does not negative the exceptions contained in the proviso of the enacting clause, and it cannot be amended unless the evidence shows whether or not the defendant's acts came within the exceptions.

ARGUED : September 8, 1899.

DECIDED : December 5, 1899.

Motion by the defendant to make absolute a rule nisi previously granted to quash the conviction of the defendant by the police magistrate for the town of Pembroke and the townships of Alice, Fraser, etc., for unlawfully exercising the calling of a hawker or pedlar, contrary to a by-law of the county of Renfrew passed on the 15th June, 1898, purporting to have been made pursuant to sec. 583 of the Ontario Municipal Act, R.S.O. ch. 223.

That section provides as follows :—"By-laws may be passed by the councils of the municipalities \* \* and for the purposes in this section respectively mentioned, that is to say : \* \*

(14) For licensing, regulating and governing hawkers, pedlars or petty chapmen, and other persons carrying on petty trades, or who go from place to place or to other men's



houses, on foot, or with any animal, bearing or drawing any goods, wares or merchandise for sale \* \* and for determining the time during which the license shall be in force ;

Provided always that no such license shall be required for hawking, peddling or selling from any vehicle or other conveyance any goods, wares or merchandise to any retail dealer, or for hawking or peddling any goods, wares or merchandise, the growth, produce or manufacture of this Province, not being liquors within the meaning of the law relating to taverns or tavern licenses, if the same are being hawked or peddled by the manufacturer or producer of the goods, wares or merchandise, or by his bona fide servants or employees having written authority in that behalf ; and such servant or employee shall produce and exhibit his written authority when required so to do by any municipal or peace officer."

TORONTO, September 8, 1899.

*Watson, Q.C.*, for defendant : Conviction is bad because it does not upon its face negative the exception in the proviso to sub-sec. 14, and it cannot be amended because the evidence does not show that the defendant did not come within such exception ; *Regina v. McFarlane* (1897), 33 Can. Law Jour. 119.

No cause was shown.

TORONTO, December 5, 1899.

The judgment of the Court was delivered by

MEREDITH, C.J.—

The conviction which is moved against was made on the 13th April, 1899, by the police magistrate for the town of Pembroke and the townships of Alice, Fraser, etc., and is for unlawfully exercising the calling of a hawker or pedlar, to wit, going from place to place and from house to house with a vehicle drawn by horses and carrying goods, wares and merchandise, to wit, sewing machines, contrary to a

by-law of the corporation of the county of Renfrew, numbered 573, in that behalf.

By-law No. 573 was passed on the 15th June, 1898; it recites the provisions of sub-sec. 14 of sec. 583 of the Municipal Act, R.S.O. ch. 223, and that it is expedient to enact a by-law for "such purpose," that is, the purpose mentioned in the sub-section; but the enacting sections of the by-law contain no such exception as is mentioned in the proviso to sub-sec. 14 to the requirement of sec. 1 of the by-law, which is "that no person shall exercise the calling of a hawker, pedlar, or petty chapman in this county without a license obtained as in this by-law provided."

The provisions of the by-law are, in our opinion, for this reason *ultra vires*; the power conferred by the Legislature is limited by the proviso to sub-sec. 14—the power assumed to be exercised by the council is not so limited, but is general.

We decided in *Regina v. McFarlane* (1897), 33 Can. Law Jour. 119, that a similar conviction was bad because it did not negative the exception contained in the proviso, and there was no power to amend it because the evidence did not show whether or not the defendant's acts came within it.

For these reasons the conviction must be quashed.

In the circumstances of this case, in the exercise of our discretion as to costs, we do not give costs against the informant.

*Conviction quashed.*

**Note:** *Municipal by-law—Negating exception—Amendment—Cr. Code, ss. 889, 890—Costs.*

The case of *R. v. McFarlane* (1897), 33 Can. Law Jour. 119, was an application to quash a summary conviction of the defendant for alleged breach of a county by-law regulating hawkers and peddlers, in selling fresh meat without a license. The Court (Meredith, C J., Rose and MacMahon, JJ.), held that the conviction was bad upon its face, because it did not

**Note—Continued.**

negative the exception in the statute with regard to "**hawking or peddling any goods, wares or merchandise, the growth, produce or manufacture of this province**"; and **that** it could not be amended under ss. 889 and 890 **of the Criminal Code**, because the evidence, when looked at, **did** not show an offence against the by-law. It was also **held** in that case that, as the prosecutor was not discharging a public duty, there was no reason why he should **not** be ordered to pay costs, and the conviction was **accordingly** quashed with costs to be paid by the complainant, a **private** prosecutor.

See also *The Queen v. Petersky* (1897), 1 Can. Cr. Cas. 91 (B.C.), *The Queen v. Strauss* (1897), 1 Can. Cr. Cas. 103 (B.C.) and *The Queen v. Nunn* (1884), noted at 1 Can. Cr. Cas. 108 (Ont.), by which latter decision it was held **that** an exception by way of proviso in a by-law need **not** be negatived in either the commitment or the conviction.

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., TOWNSHEND, J., GRAHAM, E. J.,  
MEAGHER AND HENRY, JJ.

**THE QUEEN v. ETTINGER.**

*Summary proceedings — Issuing summons a judicial act —  
Canada Temperance Act, sec. 105 — Necessity of two  
justices receiving the information — “Bringing a prosecution” —  
Meaning of — Cr. Code 559, 842, 843.*

1. The issue of a summons, whether in relation to an offence punishable summarily or to an indictable offence, is a judicial act.
2. Notwithstanding section 105 of the Canada Temperance Act and section 842 of the Criminal Code, an information charging an offence under the Canada Temperance Act must be laid before two justices, who must concur in directing the issue of the summons, but it is not necessary that the information or the summons issued thereon should be signed by more than one of such justices.

ARGUED : January 26, 1899.

DECIDED : March 14, 1899.

On the 14th October, 1898, Albert Ettinger was convicted before two justices of the peace for Hants County, of an offence against the provisions of the Canada Temperance Act.

On the 15th November, 1898, the learned Chief Justice granted an order for the issue of a writ of certiorari to remove into this court the conviction so made, with all things touching the same. From this order, David McLeod, the inspector under the Canada Temperance Act for East Hants, has appealed to this court.

The principal grounds upon which the writ was granted, were, because the information was bad on its face, and was not laid before two justices, but was laid before one justice only, in the absence of the other named in the summons, and who was one of those that made the conviction.

HALIFAX, January 26, 1899.

A. Drysdale, Q. C., in support of appeal : Sec. 14,

of Canada Statutes, 1888, ch. 34, gives a special form of information, which is an information before one justice. *Ex parte Sprague*, 31 N.B.R. 236, is not binding on this court, and is not good law. [MEAGHER, J.—In *Sleeth v. Hurlbert*, 25 Can. S.C.R. 620, the court attached great importance to a mere blank in the form. Here the form provided by the statute is especially adapted for one justice.] The prosecution is not brought until the summons is issued. *Yates v. The Queen*, 14 Q.B.D. 657; *Regina v. Ramsey*, 11 Ont. R. 210; *Regina v. Johnson*, 13 Ont. R. 1.

*J. J. Power*, contra : The information must be laid before two justices. The commencement of the prosecution is the laying of the information: *Thorpe v. Priestnal* [1897], 1 Q.B. 159; *The Queen v. Sproule*, 14 Ont. R. 388; *The Queen v. Collins*, 14 Ont. R. 616; *The Queen v. Durnion*, 14 Ont. R. 676; *Ex parte Sprague*, 31 N.B.R. 236; *Ex parte White*, 33 Can. L.J. 776; *The Queen v. McDonald*, 29 N.S.R. 35; *The Queen v. Griffin*, 9 Q.B. 155; Burns' Justice of the Peace, vol. I., pp. 1107 and 1108; *The Queen v. Salter*, 22 N.S.R. 207; *The Queen v. Leonards*, 34 U.C.Q.B. 28. The same form as Form R. in the Canada Statutes of 1888, is found in the Nova Scotia Acts, 1886, ch. 3, p. 113. *The Queen v. Brown*, 23 N.S.R. 21, was decided, in the face of the N.S. Acts, 1888, ch. 4, sec. 17, which is stronger than the Act under consideration was. Endlich on Statutes, sec. 48. The schedule does not override the provisions of the statute. Two justices must be present, but only one need sign the information.

*A. Drysdale*, Q.C., in reply, referred to *Sleeth v. Hurlbert*, 25 Can. S.C.R. 620, [3 Can. Cr. Cases 197]. The amendment of 1888 was, presumably, made in the light of the Ontario decisions, and was intended to obviate the necessity of laying the information before two justices.

HALIFAX, March 14, 1899.

RITCHIE, J.—

The facts alleged with reference to the laying of the

information were not disputed, but counsel for the inspector contended that, under the 105th section of the Canada Temperance Act, as amended by chapter 34, of the Acts of 1888, the proceedings were regular, and the information could properly be laid before one justice only.

This section is as follows :—

“If such prosecution is brought before any two other justices of the peace, all acts and proceedings, prior to the hearing and trial, may be done and taken by one of them ; and no justice, other than such two justices, shall sit or take part therein, except in the case of their absence, or the absence of one of them ; and not in the former case, except with the assent of the prosecutor ; nor in the latter, except with the assent of such justice who is present.”

In the case of *The Queen v. Brown*, on appeal to this court, reported in 23 N.S.R., at page 21, I had occasion to consider the effect of a similar section in the Liquor License Act, but which is, if anything, more favourable towards sustaining the present contention of the inspector, than section 105 above mentioned.

The conclusion at which I arrived was, that the two justices must be present when the information is laid and the summons granted, but it is not necessary that both should sign the information. The reasons then given appear in the judgment in the printed report. That view is, I think, equally applicable to the corresponding section (105) of the Canada Temperance Act, unless there is some legislation of the Dominion Parliament which requires that the section should receive a different construction.

Section 559 of the Criminal Code, read in connection with section 843, shows that the issue of a summons in relation to an offence punishable summarily, as well as an indictable offence, is, since the Code came into force, a judicial act. The justice is required to hear and consider the allegations in the complaint or information, and the issue of the summons is dependent upon his opinion, as to, whether or not a case has been made out. This, I think

must be held to be a judicial act on the authority of *Hope v. Evered*, 17 Q.B.D. 338, and *Lea v. Charrington*, 22 Q.B.D. 45 and 272.

If this judicial act is to be performed by both justices, then it is clear that they must both be present and consider the information before any summons is issued. But subsection 3 of section 842 of the Criminal Code, which also applies to these proceedings, provides that—

“Any one justice may receive the information or complaint and grant a summons or warrant thereon, and issue his summons or warrant to compel the attendance of any witness for either party, and do all other acts and matters necessary preliminary to the hearing, even if by the statute in that behalf it is provided that the information or complaint shall be heard and determined by two or more justices.”

The expression “grant a summons” differs materially from the signing of the summons mentioned in the clause of the local Act above referred to, and certainly seems to imply, that in proceedings under the Code, even where two justices are required to hear the information, one justice can perform the judicial act of granting the summons prescribed by section 559.

In the general Act, so far as I have been able to ascertain, there is no provision similar to section 105 of the Canada Temperance Act, defining the particular justices before whom the trial is to take place, except that the same justices shall be present and act together during the whole hearing and determination of the case, and the difficulties which arise in prosecutions under the Canada Temperance Act do not occur in other cases. It seems to me, that in construing section 105, we can receive little, if any, assistance from other sections of the Act, or from the different sections of the Criminal Code, but must rely upon the terms of that section, and endeavour to ascertain their true meaning.

The first question which naturally arises is: What is the meaning of the expression, “if such prosecution is

brought"? or, in other words, what is the "bringing of the prosecution"? According to the terms of the section, it is something that takes place before the justices, prior to the hearing and trial, and between which, and the hearing and trial, acts and proceedings may be done and taken. In my opinion, the only thing done before the justice or justices, to which it can be applicable, is the laying of the information or the issue of the summons.

The Court of Queen's Bench in England has decided in *Thorpe v. Priestnall* [1897] 1 Q.B. 159, that the laying of the information is the commencement of the prosecution, and that no distinction is to be drawn between the words, "institute" and "commence." I can see no distinction between "bringing a prosecution" and "instituting" or "commencing" one, and, if the English authority is to be followed, it means the laying of the information. If this be the correct view, and I think it is, both the justices must be present when the information is laid, and must concur in directing the issue of the summons. All further acts and proceedings between that period and the trial, such as the issue of subpœnas, warrants, etc., may be done or taken by either of those justices, and then there is no difficulty in ascertaining what justices shall sit on the trial; besides this, by this construction, effect is given to all the words of the section.

On the other hand, if the laying of the information is not the bringing of the prosecution, what is the bringing? I am unable to say what it is. If the information is laid before, and the summons issued by, one justice only, who is the other justice who can also do and take all acts and proceedings prior to the hearing and trial, and before whom the trial is to take place? No power is given to the justice who takes the information and issues the warrant to select him, and it is clear he must be one of the justices before whom the prosecution is brought.

I can come to no other conclusion than that the true and proper construction of section 105 requires the information to be laid before two justices, and the summons



granted by them, both being present, but it is not necessary that the information or summons should be signed by more than one. I also think that the information should show on its face, that it has been laid before two justices, and that their names should appear therein ; the summons should, of course, follow the information. It was also contended that because it was stated in the form of the information contained in the appendix to chapter 34, of the Acts of 1888, that the information was laid before one justice of the peace, the presence of two could not be intended to be required. But the form in question is a general one, and its use permissive only, and the form itself declared to be sufficient in the cases thereby respectively provided for. It does not negative the presence of both justices, and if it did in any way conflict with the provisions of the Act itself, the form would have to give way. Although I think the form in the appendix is at common law insufficient in a case like this, in which the jurisdiction should appear on the face of the proceedings, it might, under the statute, be held sufficient to prevent the conviction being quashed, if both justices had been present when the information was laid and the summons granted.

The appeal should be dismissed with costs.

TOWNSHEND, J., GRAHAM, E. J., and HENRY, J., concurred.

MEAGHER, J., (dissenting)—

The defendant was summoned before two justices to answer a charge of having unlawfully sold liquor contrary to the provisions of the second part of the Canada Temperance Act. He appeared before the justices named in the summons, at the time and place therein mentioned, not personally, but by his solicitor or counsel. The trial proceeded in due form, and witnesses were called, examined, and cross-examined by the defendant's solicitor, without any objection, protest or complaint on the defendant's behalf, until after the case of the prosecutor was completed, and it

was announced that he had rested his case. At that stage it was objected that the information purported to have been laid before only one of the justices.

I think the objection came too late.

The office of the information was to state the charge, and that of the summons was, so far as this question is concerned, simply to notify the defendant of the charge made against him, and the time and place at which, and the justice before whom, it would be heard. The defendant recognized its sufficiency for that purpose, and appeared according to its requirements, and without protest or complaint of any defect in the process, or want of jurisdiction in the justices, entered upon the trial of the merits of the complaint against him—thus, as I venture to assert with much confidence, submitting himself to the jurisdiction of the tribunal hearing the complaint. The objection urged is a technical one, and does not affect the merits.

If a warrant had issued instead of the summons, and the defendant was brought before the justices under it, a stricter rule might have to be applied. But there was no compulsion here. The defendant went voluntarily before the justices and submitted himself, without remonstrance or objection, for trial upon the charge disclosed in the summons.

I do not think that he ought to be permitted to appear, and take his chances of an acquittal upon the merits, and, failing that, and when he finds the facts on the merits against him turn around and raise a technical objection not affecting the merits at all.

When he appeared in answer to the summons, and submitted himself for trial upon the charge, the justices acquired jurisdiction over him and over the complaint, even if the alleged prior defects existed. His appearance by counsel or solicitor, whichever it was, served the same purpose as the issue of a summons, regular and valid in all particulars. *Blois v. Richards*, 7 R. & G. 203; *Forbes v. Smith*, 10 Ex.; *Dudley v. Jones*, 1 R. & C. 306.

The defendant had the same knowledge before the trial began that he had when the objection was raised. The

summons, upon its face, disclosed the material upon which the objection was rested. Why then did he play fast and loose with the justices, the witnesses, and the prosecuting officer? My answer is: Because he deliberately speculated with the chances of the prosecution being unable to prove the charge against him. If the proceedings were invalid and without jurisdiction, as is now contended, the witnesses were not properly sworn, and would not, I take it, be liable for perjury, nor could any other effective step be taken in the matter. The defendant knew this, yet he stood by not only without objection, but took an active part in the trial, and cross-examined the witnesses on the merits, and treated the proceeding as if it were entirely regular. This was trifling with the court and with the interests of justice. If the proceedings were without jurisdiction, as he alleges, he had no business there. If he had not attended and taken part, the proceedings, for ought we know, might have been abandoned.

In *Beresford v. Geddes* (1867) L.R. 2 C.P. 289, Bovill, C.J., said:—

“No summons issued, and no formal order in writing was made, but all the parties were before me, and no objection was taken to the want of a summons.”

Wills, J., said:—

“In strictness, no doubt, there should have been a summons. But no objection was taken on that score.”

Keating, J., said:—

“The want of a summons was cured by the appearance of the defendant, and cannot now be insisted on.”

See also *Ex parte Yeatman*, 16 Ch. D. 283, and *Ex parte Morgan*, 2 Ch. D. 72.

Crompton, J., in the course of the argument in *Turner v. The Postmaster General*, as reported in 34 L.J.M.C. 10, said:—

“They (the accused) seem to have objected that there was no information, but that was too late when they had appeared and cross-examined the witnesses.”

In *Regina v. Shaw*, 10 Cox, C.C. 72, Erle, C.J., said :—

“Now, no summons was proved at the trial of this indictment, and no written information warranting the issue of the summons was proved, but, in my opinion, and in my experience, when a party appears before a justice charged with an offence within his jurisdiction, the justice has jurisdiction to dispose of a case without a summons, or without any information in writing being laid before him, unless the statute creating the offence imposes the obligation of not hearing the case without these preliminaries. The whole of the proceedings may be drawn up on the hearing.”

Blackburn J. :—

“The substance of the objection was, that the justices had no jurisdiction to hear the cause, because, prior to the summons, there was no information or complaint. . . . But if he chooses to waive the information, and allow the hearing to proceed, the justices have jurisdiction.”

Smith, J. :—

“Unless it is required by statute, where a party voluntarily appears to answer a charge preferred before a magistrate, no information or summons is necessary.”

In *The Queen v. The Justices of Salop* (1859) 3 E. & E. 390, Crompton, J., said :—

“I think that the effect of the facts as they appear on the face of these affidavits is, that the parties came before the justices, invited them to decide the matter, and did not in any way decline their jurisdiction. The justices having given their decision, it is too much to come and ask us to issue the discretionary writ of certiorari. It is said that *mala fides* is not imputed to the applicant. I think that he has acted against good faith to this extent, that he has first asked the justices to decide the case, taking the chance of their decision being in his favour, and then sought by the present application to get rid of their decision, it having proved to be unfavourable.”

Upon the trial there the applicant's attorney took two objections to the validity of the rate, which were overruled

by the justices, and then he gave notice that he *bona fide* disputed the validity of the rate. This was also overruled. The statute which governed the proceedings there, provided that if the party disputed the validity of the rate, and gave notice to the justices hearing the proceeding, that he disputed the validity of the rate, "the justices should forbear giving judgment thereupon." If a waiver had not taken place there, the justices would have been without jurisdiction as soon as the validity of the rate was disputed.

Hill, J., said, in the same case :—

"If a party comes to this court and asks for a certiorari to bring up an order that it may be quashed he is bound to satisfy us that he has done nothing to preclude him from the relief he seeks."

See also the observations of Lord Brougham in *Taylor v. Clemson* (1844) 11 C. & F. 610; *Rex v. Aikin*, 3 Burr. 1785; *Rex v. Johnson*, 1 Str. 261; *Rex v. Stone*, 1 East 649.

In *Regina v. Hughes*, 4 Q.B.D. 626, Hawkins, J., said :—

"A flood of authorities might be cited in support of the proposition that no process at all is necessary when, the accused being bodily before the justices, the charge is made in his presence, and he appears and answers to it."

There are, it is true, some passages in Paley on Convictions tending to show that an information and summons are necessary to ground jurisdiction, but Huddleston, B., in *Regina v. Hughes*, at page 635, thus refers to and explains them :—

"The passages quoted in the argument from Paley on Convictions, and Smith's Leading Cases, have reference to the statement of the information in the old form of conviction, where, of course, it became necessary to show, in that part of the conviction, all the ingredients to give jurisdiction. The form of conviction in Jervis' Acts omits the information."

I might also refer to *Stoness v. Lake*, 40 U.C.Q.B. 328; *Regina v. Bennett*, 3 Ont. R., at p. 64; *Regina v. Clarke*, 19 Ont. R. 601; *Regina v. Roe*, 16 Ont. R. 3, and *Regina v. Menary*, 19 Ont. R. 691.

In *Regina v. Justices of Carrick-on-Suir*, 16 Cox C.C. 571, Morris, C.J., speaking for the whole court, said :—

“ But whether the summons was good or bad, I imagine that it is now law sufficiently well established that a person who appears in answer to a summons, and takes his trial and chances of acquittal, is considered as having waived any objection to the summons. . . . The defendant having appeared to the summons, he was exactly in the same position as if he had been most properly, legally, and technically summoned without the slightest irregularity.”

In *Van Boven's Case*, 9 Q.B. 683, Coleridge, J., said :—

“ Whether there has been an illegal detainer, or whether the magistrates properly or improperly remanded the prisoner from the 31st of August, is immaterial to this conviction, and upon these questions we say nothing. The justices still had their jurisdiction to hear and determine the offence when they did.”

See Paley on Convictions, 87, 99 note *g*, 104, 107, and 109 note *g*. On the latter page the rule is thus stated :—

“ If the defendant appears, any irregularity in the summons, or even the want of a summons altogether, becomes immaterial, unless the statute creating the offence imposes the necessity of some such step.”

There are three cases, which, at first sight appear to be opposed to the proposition supported by the above authorities. They are, *Regina v. Scotten* (1844) 5 Q.B. 493; *Dixon v. Wells*, 25 Q.B.D. 249, and *Blake v. Beech*, 1 Ex. D. 320.

Lord Campbell, in *Regina v. Berry*, 1 Bell's C.C. 60, shows the ground on which *Regina v. Scotten* proceeded. He said :—

“ There the act expressly provided that before any proceeding shall be taken, or had, upon the information, either for summoning the party accused, or compelling his appearance to answer the same, the charge contained in such information shall be deposed to on the oath of some person or persons other than the informer.”

Stronger language to create a condition precedent to the exercise of jurisdiction by the justice could not be used. Erle, C.J., in the passage from *Regina v. Shaw* which I have quoted, enunciates the same principle, namely, that there must be an information, &c., where the statute imposes the obligation of not hearing the case without the statutory formalities being complied with. See also the observations of Hawkins, J., at page 628 in *Regina v. Hughes*; of Manisty, J., at page 630; of Huddleston, B., at page 635, and of Denman, J., page 639, with respect to the grounds of the decision in *Regina v. Scotten*, agreeing with Lord Campbell's view above cited.

With respect to *Dixon v. Wells*, I need only say it proceeded upon a statute which the court in that case held had made it a condition precedent to the magistrate's jurisdiction, that the proceedings should be brought within the operation of sec. 10; and that in all prosecutions under the Act certain things should be done and certain things should not be done. The section was held to be "strongly imperative," and further the statute required the jurisdiction to be exercised within 28 days—the articles being perishable—and it was not so exercised. See per Lord Coleridge, C.J., at p. 259 of the report.

As to *Blake v. Beech*, it was heard by Cleasby, Grove and Field, JJ. The latter dissented, and Huddleston, B., in *Regina v. Hughes*, at page 635, referring to *Blake v. Beech*, said: "I subscribe to every word in my brother Field's judgment in that case," a circumstance which must detract from its authority. In that case, however, the objection was taken before the case was proceeded with, and there was no waiver, and no grounds for it, such as exist in the present instance.

I may also, with great propriety, refer to *Sheppard and Turner v. The Postmaster General*, 5 B. & S. 756; *Regina v. McMillan*, 2 Pugs. 112; *Regina v. Mason*, 29 U.C.Q.B. 433; *Regina v. Clarke*, 20 Ont. R. 462; *Ex parte Orr*, 20 N.B.R. 67, and *Ex parte Sonier*, 2 Can. Cr. Cases 121.

The magistrates who sat to hear the case were those

named in the summons. The defendant knew when he received the summons that these magistrates would sit to adjudicate upon the charge. No doubt could arise as to who were the justices to try the case. The mere fact that the proceeding is to be brought before two justices cannot fairly be regarded as creating a condition precedent so as to deprive the justices of the power to hear and determine the charge, after he had, without objection, appeared before them in answer to the summons. Jervis' Acts, as well as our own, refer to many cases requiring to be brought before a single justice, and they provide for the laying of an information, and the issue thereon of a summons, in terms the same as or similar to our statutes, and if the contention now made, that those words create a condition precedent to jurisdiction which could not be waived be correct, the "flood of authority" holding that there may be a waiver, to which Mr. Justice Hawkins referred in *Regina v. Hughes*, never could have come into existence. I have searched in vain for any words in the statute upon which this proceeding is founded, which to quote Erle, C.J., "imposes the obligation of not hearing the case without the preliminaries in question." If a justice not named in the summons had heard the case, there would, perhaps, be room for that argument.

Apart from the question of waiver, it seems to me that *The Queen v. Russell*, (1849) 13 Q.B. 237, is in point to show that what was done here was regular. The form there prescribed was in terms, "before two justices," and the information was required to be brought and tried before two. By section 855 of the Code it is provided that if both parties appear, either personally or by counsel or attorney, before the justice who is to hear and determine the complaint or information, such justice shall proceed to hear and determine the same. This means, of course, upon the merits. Where, therefore, there has been an appearance, and the trial has proceeded without objection, as this one did, the justice must proceed and determine the complaint.

I take it that the defendant's counsel pleaded for the



defendant, and denied his guilt before the trial began, or at its commencement, and thereupon, having regard to the provisions of the statute, the justices were bound, no objection to their jurisdiction having been interposed, to proceed with the hearing upon the charge before them. His failing to object probably induced them to proceed with the hearing upon the merits, thus entailing labor, time and expense upon the prosecutor and justices which otherwise might have been avoided.

The view I have endeavored to present as to the waiver appears to me all the stronger when we recall the fact that certiorari is taken away by the provisions of the statute under which this complaint was laid, and which also enacts that no conviction \* \* \* or other process or proceeding under the Act, shall be held insufficient or invalid by reason of variance or by reason of any other defect in form or substance, if it can be understood from the conviction, warrant, process or proceeding, that it was made for an offence against some provision of the Act within the jurisdiction of the justice; and if there is evidence to prove such offence, and no greater penalty is imposed than is authorized by the Act.

I dealt with this aspect of the statute very fully in *The Queen v. Rood*, 28 N.S.R. 160, and I shall not repeat what I then said with the concurrence and approval of those of my learned brothers with whom I was associated in the hearing of that case.

There is no complaint that the charge and the person of the defendant were not within the jurisdiction of the justices; nor that the matter of the complaint was not an offence against a provision of the statute; nor that the evidence did not prove the charge; nor that an inappropriate penalty was imposed. When, therefore, these conditions exist, as we must assume they do here, the court is not permitted to quash a conviction for a defect in form or substance of any proceeding under the Act. Assuming that there was a defect, it was—in fact it was alleged to be—in the information or summons, and it clearly was one either of substance or form. It is those defects which the statute says shall not

be made the foundation for quashing a conviction where the latter comes up to the standard of the statute ; that is, a conviction from which it can be understood that it was made for an offence against a provision of the Act and was not for too large a penalty.

But be that as it may, the defendant upon the hearing, and especially by pleading to the merits, "passed by the occasion when he could have enforced his legal right to object (on the ground of the alleged defect), and therefore lost such right forever."

I do not think that, in the circumstances of this case, the application could succeed even if there had been no information or summons at all.

By sec. 105 of the Canada Temperance Act, as it stood until amended by chap. 34 of the Acts of 1888, it was provided that if such prosecution is brought before any two other justices of the peace, the summons shall be signed by at least one of them, and no justice other than such two justices shall sit or take part therein, except, etc., thus, apparently, making it necessary that there should be a summons.

By chap. 34, referred to, sec. 105 was repealed and the following substituted :

"105. If such prosecution is brought before any two other justices of the peace, all acts and proceedings prior to the hearing and trial may be done and taken by one of them, and no justice, etc."

The specific provision requiring the issue of a summons does not now exist. The old section, as I have said, conveyed the idea that there must be a summons signed at least by one of them ; but I have been unable to find any provision in the statute, as it now stands, which makes the laying of an information and the issue of a summons an essential prerequisite to the hearing of a charge under this statute. The views expressed in several of the cases cited show that the law is not so under Jervis' Acts, which, in this respect, do not differ materially from ours.

*Appeal dismissed, and conviction quashed,*  
(Meagher, J., dissenting).

## [COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE).

DISTRICT OF MONTREAL.

BEFORE OUIMET, J.

BEFORE WÜRTELE, J.

## THE QUEEN v. O'DEA.

*Harboring deserting seaman—Information—Failure to allege nationality of vessel—Evidence—Presumption—Constitutional law—Application of Seamen's Act (Can.)—Imperial Merchant Shipping Act—Desertion from registered British ship—Appeal from conviction—Practice—Seamen's Act, R.S.C. 1886, c. 74, s. 104—Cr. Code, 742, 879, 880, 900.*

1. *Per* Ouimet, J.—Upon a prosecution for harboring and secreting a deserting seaman the procedure to be followed and the punishment to be imposed are governed by the Seamen's Act of Canada if the offence was committed in Canada by a resident of Canada, and section 711 of the Imperial Merchant Shipping Act, 1894, is confirmatory of such rule as regards cases coming within the latter Act.
2. *Per* Ouimet, J.—The appeal from a summary conviction under the Seaman's Act of Canada for harboring and secreting a deserting seaman is under section 879 and not under section 742 of the Criminal Code, and in the Province of Quebec the appeal should be taken to the Crown Side and not to the Appeal Side of the Court of Queen's Bench of that province.
3. *Per* Wurtele, J.—Where the information sets up in general terms that the accused had harbored and secreted a seaman who had deserted from a vessel named, but contains no allegation that the vessel was a duly registered British ship, the necessary intendment is that the prosecution is brought under the Seamen's Act of Canada.
4. *Per* Wurtele, J.—In such case it is necessary for the accused to plead and prove the vessel to be a duly registered British ship before jurisdiction under the Seamen's Act of Canada is ousted on the ground that the Imperial Merchant Shipping Act governs the case, the punishment provided in the latter statute being limited to cases of desertion from registered British ships, while the Canadian statute applies to ships of all nationalities and whether registered or not.

DECIDED : September 25, 1899 and January 8, 1900.

Frank Vaughan, a constable, on the 10th July, 1899, laid an information against James O'Dea, an hotelkeeper of the City of Montreal, charging him with having on the 7th July,

1899, at the City of Montreal, wilfully harbored and secreted John Connelly and Azel Christianson (two seamen, legally engaged and bound as such, on the steamship *Assyrian*, which was then in the harbor of Montreal, but who had deserted from her) knowing that they had deserted from their ship. The case came before His Honor F. X. Choquette, one of the judges of the Sessions of the Peace for the City of Montreal, and was tried summarily ; and on the 2nd August, 1899, a conviction was rendered against the defendant for each of the two seamen, and he was adjudged to be imprisoned for three months in each case, but it was ordered that the imprisonment in the two cases should run concurrently.

At the trial the desertion and harboring of the two seamen and the defendant's knowledge of their desertion were proved, but no proof was made to establish that the ship was a British ship and whether she was registered either in the United Kingdom or here.

The defendant brought an appeal from these convictions to this Court in the September term of 1899, Mr. Justice Ouimet presiding. The appellant contended that the case fell under the "Imperial Merchant Shipping Act, 1894," which allows an appeal from summary convictions when the fine inflicted exceeds five pounds, while the Crown and the private prosecutor maintained that the case fell under and was governed by the "Seamen's Act" of Canada, being chapter 74 of the Revised Statutes, which provides that there shall be no appeal from convictions rendered for offences under it.

The question submitted to the Court was, which of these two statutes was applicable to the case and governed it ?

MONTREAL, September 25, 1899.

The following judgment was delivered by

OUMET, J.—

O'Dea, a resident of this city, has been tried before His Honor F. X. Choquette, Esquire, a judge of the Sessions

of the Peace, and convicted under the Seamen's Act, R.S.C. cap. 74, s. 104, for harboring and secreting a deserting seaman. The sentence is three months' imprisonment in the common jail with hard labor. A notice of appeal to this Court has been served upon Judge Choquette and security entered under article 879 (c) of our Criminal Code. A motion is now made on behalf of respondent to quash the appeal on two grounds:—First, because of the inadequacy of the notice, and, secondly, because the right of appeal from such a conviction is taken away by s. 118 of the Seamen's Act.

Referring in the first place to this second ground of objection, i.e., that the right of appeal in this instance has been taken away, I find that such is the effect of the statute cited. But the appellant claims that he should have been tried under the Imperial Shipping Act, 1894, s. 236, which creates the same offence with fine as a penalty instead of imprisonment.

The same Imperial Statute, s. 682, also provides for an appeal from summary conviction under the Act when the fine exceeds five pounds.

The appellant argues that in default of the prosecution to state under what statute he intended to prosecute the defendant, the Imperial Statute should be held as the prevailing statute, and its provisions should be followed. It is true that neither the information nor the conviction of record mention the specific statute under which the proceedings have been taken.

It is sufficient for me to find from the record before the Court that the offence described therein is an offence provided for by our statutes and that it has been tried before the competent tribunal and according to the provisions of such statutes. The Seamen's Act was the law of the land for many years. It was never disallowed by the Imperial authorities, and I cannot see how or why it should be superseded by the provisions of the Merchant Shipping Act. This latter Act provides that it shall be in force in all the British possessions, but it also provides, s. 711, that "any offence

under this Act shall in any British possession be punishable by any court or magistrate by whom an offence of a like character is ordinarily punishable, or *in such other manner* as may be determined by any Act or ordinance having the force of law in that possession."

This provision seems to me to clearly show that instead of repealing our own law in this matter, it confirms it, and leaves to every British self-governing possession the right to enact and enforce their own laws providing for the punishment of the same and similar offences committed by their own people within their own legislative jurisdiction. The offence in the present case has been committed on Canadian soil by a resident of this city, and I cannot but come to the conclusion that he has been rightly convicted and sentenced under our own law, the Seamen's Act, before the tribunal having full and final jurisdiction in the matter under this Act.

It has been contended by the learned counsel for the Crown that if there is an appeal in this case it should be under art. 742 of our Code to the Court of Queen's Bench in Appeal, and not to this court which is a court of first jurisdiction in criminal matters. I cannot agree with that contention. Sections 114 and 115 of the Seamen's Act provide that all offences under the Act shall be tried in a summary way according to the provisions of the Act intituled, "An Act respecting summary proceedings before justices of the peace," Ch. 178, R.S.C. The judges and magistrates to whom jurisdiction is given for the trial and determination of these prosecutions are given all the powers of two justices of the peace. The "Act respecting summary proceedings before justices of the peace" has now been replaced by part LVIII of our Code, arts. 839 to 910 (summary convictions). An appeal would therefore lie in the present case not to the Court of Appeals, but to this court under art. 879, if such appeal had not been expressly taken away, as I have already stated.

I am also of opinion that the present appeal should be

dismissed for want of due notice in conformity of art. 88o (b). The notice given to respondent is not a notice of appeal, but a notice to the respondent that in order to obtain his liberation under art. 88o (c) he will give the required security.

*Appeal dismissed with costs.*

The defendant then obtained under sec. 900 of the Criminal Code a case stated by the convicting justice under the direction of the Honorable the Attorney-General of the Province, asking the opinion of this Court on the following question :—" Whether the Imperial Merchant Shipping Act, 1894, or the Seamen's Act of Canada, should under the " circumstances of the case apply to it ? "

The stated case was argued before the Court, Würtele, J., presiding, and the following judgment delivered thereon:—

MONTREAL, January 8, 1900.

WÜRTELE, J.—

Section 236 of the Imperial Merchant Shipping Act, 1894, enacts that any person who wilfully harbors or secretes a seaman who has deserted from his ship, knowing the seaman to have done so, shall for every seaman so harbored or secreted be liable to a fine not exceeding twenty pounds ; and section 104 of the Canadian Seamen's Act provides that every person who wilfully harbors or secrets any seaman who has deserted from any ship, knowing such seaman to have done so, shall for every such seaman so harbored or secreted, be liable to an imprisonment, with hard labor, for a term of not more than six months nor less than three months.

There are two differences between the provisions of these two sections. In the first place the Imperial law only inflicts a fine, while the Canadian law is more severe and imposes an imprisonment ; and in the next place the provisions of the section of the Imperial Act only apply in cases

where the ships from which the desertion of seamen has taken place are British ships and when they have been duly registered as such, while the provisions of the section of the Canadian Act apply to any and all ships whatever their nationality may be, and whether they have been registered or not.

The information in the present case does not specify whether the steamship *Assyrian* is a British ship nor whether she was registered as such anywhere, and no proof of her registration as a British ship was made or offered by either the prosecutor or the defendant. The information sets up in general terms that the defendant had harbored and secreted two seamen who had deserted from the steamship *Assyrian*, and, in the absence of an allegation that she was a duly registered British ship, the necessary intendment is that the prosecution was brought under the Canadian Statute. Then as no proof was made of the registration of the steamship *Assyrian* as a British ship and as this was necessary for a conviction for harboring deserters from her under the Imperial Statute, the case had necessarily to come under the Canadian Statute, if the circumstances proved brought it within its scope, and if they did not it should have been dismissed.

Under the circumstances of the case, I am clearly of opinion that the prosecution was brought under the Canadian law and that the learned judge of the sessions was correct when he applied the Canadian statute to the case and founded the convictions and his adjudication of punishment on it.

But the appellant contends that the Canadian enactment is absolutely void and inoperative as being repugnant to the provisions of section 236 of the Imperial Merchant Shipping Act, 1894, and that the convictions if founded on the provisions of section 104 of the Canadian Seamen's Act are consequently illegal, null and void. I have, therefore, to examine the legislative power and authority of the Parliament of Canada.



Under section 91 of The British North America Act, 1867, generally known as the Confederation Act, the Parliament of Canada has full and absolute legislative power and authority to make laws for the peace, order and good government of the country in relation to all matters whatsoever not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, but with the restriction, under the provisions of the Act 28 and 29 Victoria, chapter 63, which is known as the "Colonial Laws Validity Act" and which was passed by the Imperial Parliament in 1865, that any law which might be so enacted and which might be repugnant to the provisions of an Imperial Statute extending to and having force in Canada would be void and inoperative to the extent only of such repugnancy but not otherwise. Section 104 of the "Seamen's Act" does not fall within any of the subjects which are within the exclusive legislative jurisdiction and control of Provincial legislatures, and the Parliament of Canada had full legislative power and jurisdiction to enact the provisions contained in it, subject only to the restriction contained in the "Colonial Laws Validity Act."

Now the only repugnancy between section 104 of the Canadian statute and section 236 of the Imperial statute is with respect to ships which have been registered as British ships. Any Canadian enactment making any change in the law as contained in the Imperial Statute with respect to the punishment of persons harboring and secreting deserters from British ships, which have been registered as such, would be void and inoperative in the case of prosecutions brought with reference to such ships, but would be void and inoperative only to that extent. But section 104 legislates for more than British ships, registered as such; it legislates for any and all ships, and it is valid and effective under and in virtue of the general legislative power and authority conferred on and possessed by the Parliament of Canada, when it deals with ships which have not been, or are not alleged and declared to have been, registered as British ships.

I am of opinion that the Canadian enactment is in force, and is operative, and that cases which relate to ships which are alleged and shown to have been registered as British ships, alone are exempt from its operation, and beyond its legal scope, and that under the circumstance of the present case the Canadian statute was applicable to it and was rightly applied. If the defendants had pleaded and proved that the steamship *Assyrian* was a British ship and had been registered as such, the case would have been removed from the scope of the Canadian law, and have fallen under the Imperial Statute.

But the question had already been decided by this court when presided over by Mr. Justice Ouimet, and in answering the question of law submitted to me, all I might have done, would have been to say that the matter was *res judicata*, and that I had to follow the jurisprudence so established, as the decision of a court of competent jurisdiction is binding and conclusive upon all courts of concurrent jurisdiction as *res judicata* between the same parties, in the first place for reasons of public policy to put an end to litigation, and in the next place for reasons of private interest to prevent individuals being troubled twice for the same thing. It is, however, satisfactory for me to feel that I entirely concur with the reasons of the learned judge.

For reasons given by Mr. Justice Ouimet, and for those which I have myself stated, I therefore order that an entry be made on the record to the effect that "The Seamen's Act" of Canada, and not the Imperial Merchant Shipping Act, 1894," was and is applicable in the present cause, that the proceedings had and taken before His Honor F. X. Choquette, were regular, and that no sufficient reason has been assigned to set the two convictions aside, and I therefore affirm the two convictions and order that they be enforced by due process of law.

*Convictions affirmed.*

*Trenholme Dickson*, for the appellant.

*Peers Davidson*, for the private prosecutor.

*Cooke, Q.C.*, for the Crown.

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, TOWNSHEND, MEAGHER AND HENRY, JJ.

## THE QUEEN v. BOWMAN.

*Husband and wife—Failure to provide necessaries for wife—  
Proof that wife's health likely to be permanently injured—  
Cr. Code 210 (2).*

1. It is purely a question of fact upon a charge, under Cr. Code sec. 210, of omitting to provide necessaries for a wife, whether the acts proved are such that the health of the wife is likely to be permanently injured by reason thereof; and the words "permanently injured" have no technical meaning as used in that section.

ARGUED : November 22, 1898.

DECIDED : November 22, 1898.

The accused was charged under sub-section 2 of section 210 of the Criminal Code with unlawfully omitting, without lawful excuse, to provide necessaries for his wife, in consequence of which her health is likely to become permanently injured. Upon his arraignment the prisoner pleaded not guilty. A trial was had before J. W. Johnston, Esquire, Judge of the County Court for District No. 1, presiding in the County Court Judges' Criminal Court. The learned County Judge found him guilty, but respited sentence pending the decision of the Court of Appeal on the following questions :

*First*—Was the marriage sufficiently proven, or is the same strict proof required as in charges of bigamy ?

*Second*—Does the evidence furnish proof that the health of the prosecutrix is "likely to become permanently injured" by the omission of the accused to provide necessaries for his wife ?

*Third*—What construction is to be placed upon the words, "likely to become permanently injured" in the above section of the Code ?

*Fourth*—What is the legal meaning to be attached to the words "permanently injured" ?

*Fifth*—Does the evidence furnish any lawful excuse for the omission of accused to furnish his wife with necessaries?

The learned County Judge transmitted, with the questions reserved, the minutes of the evidence taken by him, which were to be considered part of the case.

The evidence showed that the prisoner's wife, after living with his family for a time, left, in consequence of disagreements, and went to earn her own living. Prisoner visited her at places where she was employed, but provided no necessaries for four years. She finally became unable to work, on account of pregnancy, and prisoner was asked what he was going to do towards her support, but declined to say or to make any provision for her. Prisoner was in the regular receipt of wages amounting to \$6 per week, and out of that he paid \$3 a week for his own board and lodging, and \$1 a week for the support of his child maintained by the prisoner's mother.

The following are extracts from the evidence of the prisoner's wife :—"I have no property. I am not able to work. I am now living with Mrs. Franklyn. She is keeping me for the present. I saw defendant on 10th May before warrant issued. Mrs. Franklyn was with me. I said, 'As your wife I want to know what you are going to do towards my support?' He said, 'I can't tell you now.' I had told him I was pregnant the last time before that when I had seen him. I said, 'Why can't you tell me now?' He said, 'Because I can't.' I told him then I was not able to work. He made no offer to provide for me. I am sick. Am not under medical treatment because I cannot afford to. I had been working at Mrs. Franklyn's. I cannot work and am not able to pay rent. The child I am about to have is my husband's."

HALIFAX, November 22, 1898.

*J. J. Power* for the prisoner: Under section 210 of the Code three things must be proven before a conviction can be

had, namely, a marriage, a neglect to provide necessaries, and the fact that the wife's health was likely to be permanently injured. [RITCHIE, J.: Was that not purely a matter of evidence?] It was not proved that the wife's health was liable to be permanently injured. Whether a conviction was proper, in the absence of evidence of that fact, is a question of law. *The Queen v. Philpot*, Dears. C. C. 179; Imperial Statute, 14 and 15 Vic., c. 11, is that on which *The Queen v. Philpot* proceeds. *Rex v. Friend*, 2 Rus. & Ry. 20. There was no evidence here upon which a jury could find that the health of the wife was likely to be permanently injured. *The Queen v. Nasmith*, 42 U.C.Q.B. 242, decided under R.S.C., c. 162, s. 19; *The Queen v. Davies*, 1 Q.B.D. 25; *The Queen v. Morley*, 8 Q.B.D. 571; *The Queen v. Curtis*, 15 Cox C.C. 749. Where a prosecution is against a husband or father for neglect to provide necessaries, it must be shown that death or permanent injury was the direct result of such omission, and the husband must have contemplated such injury. Burns' Justice, p. 311. *The Queen v. Smith*, L. & C. C. C. 631. The husband is excused by desertion and inability.

*Hon. J. W. Longley*, Attorney-General, for the Crown: If there is any evidence it must be assumed that the Judge below weighed the evidence and found a preponderance in favor of the Crown. There is evidence here upon which the judge could properly find facts sufficient to convict accused under this section of the Code.

*J. J. Power*, in reply.

HALIFAX, November 22, 1898.

The judgment of the Court was orally delivered by

RITCHIE, J.—

Counsel for accused abandoned the first question. The Court are of opinion, as to the second question, that there is

evidence upon which the judge could properly find against the accused.

As to the construction of the words of the Act, they have no technical meaning, and in every case it is purely a question of fact whether the acts proved are such as that the health of the wife is likely, by reason of those acts, to be permanently injured.

As to the excuse set up as a defence, it is a question of fact for the judge to decide whether or not it is sufficient.

*Conviction sustained.*

**Note :** See the following case.

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[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, TOWNSHEND, MEAGHER AND HENRY, JJ.

**THE QUEEN v. MCINTYRE.**

*Husband and wife—Failure to provide necessities for wife—Wife's health "likely to be permanently injured"—Evidence—Inferences—Reserved Case—Question of fact or of weight of evidence not to be reserved—Cr. Code 210 (2), 743.*

1. A question depending upon the facts or the weight of evidence cannot properly be made the subject of a reserved case under Cr. Code sec. 743.
2. On a case reserved upon a conviction for failing to supply necessities to a wife whereby her health is likely to be permanently injured, the conviction should be affirmed, if there is some evidence from which an inference may be drawn that such injury was likely to result from the non-supplying of necessities.

**ARGUED :** November 22, 1898.

**DECIDED :** December 3, 1898.

Crown case reserved by J. W. Johnston, Esquire, Judge of the County Court Judges' Criminal Court, District No. 1, at Halifax, as follows :—

“ The prisoner was tried before me under s. 210, sub-sec.

2, of the Code, on a charge of neglecting to provide necessities for his wife, whereby her health was likely to be permanently injured. As the result of the trial I found him guilty, and, at the request of his counsel, Mr. Power, I suspended sentence, and state a case for the judgment of the Court of Appeal :

1. Was the marriage of the prisoner and his wife sufficiently proved by the evidence of the wife and by reputation?
2. Does the evidence show that the non-supplying of necessities "was likely to permanently injure" her health?
3. Does the fact that the husband gave his wife license to do business on her own account, and had given her the requisite stock, furnish any legal excuse for afterwards neglecting to provide her with necessities?
4. Does the evidence given on the part of the defendant afford him any legal excuse for neglecting to provide his wife with necessities?"

The evidence upon which the learned trial judge found the prisoner guilty of the offence charged was to the effect that he had abandoned his wife in September, 1897; that, since that date, he had given her no food, clothing or necessities; that she had been compelled to earn her own living by doing washing and ironing; that, owing to an inward disorder, she could not stand long; that she was weak for want of nourishment, and that she was sometimes ill after working for two or three days at a time.

The learned County Court Judge delivered the following judgment on October 31, 1898:—

"The prisoner stands charged under sub-section 2, sec. 210 of the Code, with omitting to provide necessities for his wife without lawful excuse so to do, in consequence of which her health is or is likely to be permanently injured. In order to convict, the onus was on the prosecution of proving :

*First*—That the prosecutrix was the wife of the accused. I have before held that in these cases proof of reputation and cohabitation was sufficient *prima facie* evidence that the parties held the relation, the one to the other, of man and

wife, without the necessity of resorting to the strict proof of marriage required in trials for bigamy, but here the fact of marriage was proved by the wife, and of them living together as man and wife, and this was not denied by the accused.

*Second*—The omission to provide necessaries. It was incumbent on the prosecution to prove that the defendant neglected to provide his wife with necessaries, and of this I think that the evidence supplies abundant evidence.

*And thirdly*—That the health of the wife is or is likely to be permanently injured. Subject to the opinion of the Court of Appeal on a similar question reserved for their decision, in *The Queen v. Bowman*, I hold, as I held there, that where a husband omits to provide necessaries for his wife, who has no private means of her own, and who is unable to earn her own living, her health is likely to be permanently injured; and in this case the wife worked for herself and the support of her child (the care of whom was cast by the father on the mother) as long as her health admitted. I therefore am of opinion that the Crown has made out a good *prima facie* case.

The defences consisted of what I presume were deemed lawful excuses :

*First*—That the accused had given his wife permission to transact business on her own account and in her own name. To constitute this a lawful excuse, the license should have been accompanied by a deed of separation, or an agreement that in consideration of the license and permission she would no longer look to him for support. The business here failed, and the husband could not omit his legal duty to provide necessities for his wife.

*Second*—Inability. The accused swore that his wages did not average more than \$4 a week. I thought from the evidence, that average is largely below the mark, but whether or not the accused was bound to share what he did earn with those dependent on him, and if his own efforts proved insufficient, then it became his duty to apply to the overseers of the poor or some charitable institution to supplement his means. In my opinion inability cannot be urged as an excuse



by a man who deserts his wife and selfishly spends what little he has on himself.

*Third*—Offer of support. Mr. and Mrs. McIntyre agree that, when she went to him at Burchell's shop looking for support, he only offered her supper. From an admission made by Mrs. McIntyre, McIntyre on that occasion wanted her to take off her cape and stop with him, whether for supper or longer did not transpire; the inference is, I think, that it was only for supper. At all events she refused to remain, as another man occupied the premises, which consisted of a small room and the shop; and apart from having to share the apartments with another man, the place was not suitable from its furniture or accommodation for a woman to live in. I therefore find that the offer of support, whatever it was, furnishes no legal excuse for the accused.

*Fourth*—That the wife had been guilty of having had criminal connection with other men. If the charge does not go to that length, it would furnish no legal excuse; but if substantiated, I think that it would exonerate the husband from further continuing to support his wife. Mary Hayden gave her testimony in such a manner and with so much animus against the wife that I felt justified in placing no credence on it. Mrs. McIntyre did, I think, allow the two men who brought their clothes to her to be washed to remain in her room an indiscreet length of time; but there was no evidence that she had criminal connection with either of the men, and we can hardly judge persons in her station and environment by the same rigid rules that obtain in less free-and-easy and more refined life. I do not think that on this ground the accused had any legal excuse for neglecting to provide necessities for his wife.

*Fifth*—The assault. This furnishes no legal excuse. It turned out to be only a family brawl, born of jealousy. The evidence was irrelevant, and I only permitted it to be given because I thought that possibly it might lead up to some legal excuse.

The accused having neglected to provide necessities for his wife without legal excuse, and her health being likely to

be endangered thereby, I have no alternative but to find him guilty, but will defer sentence until the deliverance of the Court of Appeal, in *The Queen v. Bowman*, or on a case to be submitted in this case."

HALIFAX, November 22, 1898.

*J. J. Power* for the prisoner : There is no evidence here of likelihood of permanent injury. It is shown that the husband gave the wife his consent to her carrying on business in her own name, and furnished her with stock. R.S.N.S., c. 94, secs. 352-355. There is evidence of inability ; also, no evidence of desertion.

*Hon. J. W. Longley*, Attorney-General, contra : If there is any evidence that there was such omission to supply necessaries as would be liable to occasion permanent injury to the health of the wife, the conviction must be upheld. [HENRY, J.—The case ought to be amended. It is clear that the judge has not passed on the evidence at all, but has decided, as a matter of law, that if a man leaves his wife, and neglects to supply her with necessaries, he is liable under the Code, and the question whether he was right on that point or not is not raised in the case.] [RITCHIE, J.—The trouble is that the judgment is no part of this case.] I am content that the second question should be amended to read, "Is there any evidence that the non-supplying of necessaries was likely to permanently injure her health."

HALIFAX, December 3, 1898.

RITCHIE, J.—

This case comes before us on questions reserved at the trial by the learned County Court Judge of District No. 1, the accused having been convicted under s. 210 of the Criminal Code.

There is no appeal to this court from criminal trials before the County Court Judge but by way of a case reserved, and that judge cannot, in my opinion, reserve a case or

submit any question depending upon the facts or the weight of evidence, which must be decided by the County Court Judge. All the questions submitted in this case seem to be of this nature, but the Honorable the Attorney-General consented that the second question, which the prisoner's counsel considered the important one, should be considered as if it read thus :

"Is there any evidence to show that the non-supplying of necessaries was likely to permanently injure her health?"

I think that there is evidence from which a judge might conclude that the wife's health would be likely to be permanently injured, if necessaries were not supplied her, although I consider it so slight that, if the accused had been discharged, there would be no ground for considering the judgment wrong. The words, "likely to permanently injure," are by no means definite, and leave the question, in my opinion, entirely to the discretion of the trial judge. From a certain statement of facts, one judge might consider the health likely to be permanently injured, while another judge, equally honest, on the same state of facts, might discharge the accused, on the ground that he did not think the evidence sufficient, and did not think it likely her health would be permanently injured. It is impossible to define the amount of evidence necessary to convince a judge that the wife's health was likely to be permanently injured, and, as there is some evidence in this cause from which such an inference may be drawn, the question should, in my opinion, be answered in the affirmative.

TOWNSHEND, MEAGHER and HENRY, JJ., concurred.

*Conviction affirmed.*

**Note:** *Failure to provide necessaries for wife.*

See also *The Queen v. Bowman*, ante p. 410.

As to the effect of an agreement between husband and wife, that she should not look to him for support until his financial circumstances improved, see *The Queen v. Robinson* (Ont.) 1 Can. Cr. Cas. 28, and Note to same, page 30.

## [SUPREME COURT OF CANADA.]

BEFORE SIR HENRY STRONG, C.J., AND TASCHEREAU,  
GWYNNE, KING AND GIROUARD, JJ.

## Re LAZIER (No. 2).

*Extradition—Habeas corpus—Appeal—Motion to quash.*

1. By sec. 31 of The Supreme and Exchequer Courts Act (R.S.C. ch. 135) "no appeal shall be allowed in any case of proceedings for or upon a writ of habeas corpus arising out of any claim for extradition made under any treaty." An application to the court to fix a day for hearing a motion to quash an appeal from an order refusing a habeas corpus in an extradition matter should be refused, the matter being coram non judice and there being no necessity for a motion to quash.

DECIDED : June 7, 1899.

Application to the court to fix a day to hear a motion to quash the appeal in this case.

An order for extradition of the appellant having been made, he applied to Meredith, C.J., to be discharged on habeas corpus, which the learned chief justice refused. An appeal from his judgment to the Court of Appeal having been dismissed (*Re Lasier*, 3 Can. Cr. Cas. 167), a further appeal to the Supreme Court of Canada was taken.

Notice of motion to quash this appeal for Friday, June 10th, 1899, having been served, and the May session being about to close, Mr. A. F. May applied on June 7th to have the court name the 10th or some subsequent day to hear the motion.

OTTAWA, June 7, 1899.

The decision of the court was announced by

THE CHIEF JUSTICE.—

Mr. May has made application to the court to have a day fixed for hearing a motion to quash an appeal in a case of habeas corpus arising out of extradition proceedings, in

which there has been an order for the delivery up of the prisoner. No such appeal can be taken to this court, as section 31 of the Supreme and Exchequer Courts Act expressly provides that "No appeal shall be allowed in any case of proceedings for or upon a writ of habeas corpus arising out of any claim for extradition made under any treaty." The original Act did not contain this limitation; but in the year after that Act came into force (as soon, in fact, as the court was properly organized), it was amended by the insertion of the provision I have mentioned, and from that time to the present there has never been any question as to our want of jurisdiction in such cases.

We are now asked to hear a motion to quash an appeal which section 31 prohibits. There is no necessity for such a motion. The matter is *coram non judice*. We have no jurisdiction, and the authorities who have charge of the extradition proceedings will, no doubt, on being advised as to the appeal being entirely nugatory, take the proper steps.

Such appeals should not be encouraged; and as there is no necessity for a motion to quash, the court declines to name a special day to hear one.

*Application refused.*

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE THE HON. SIR WILLIAM RALPH MEREDITH, CHIEF  
JUSTICE OF THE COMMON PLEAS, THE HON. MR. JUSTICE ROSE,  
AND THE HON. MR. JUSTICE MACMAHON.

**THE QUEEN v. T. EATON COMPANY, LIMITED, (No. 2).**

*False trade description—Advertisement of sale of goods—Incorrect description of silverplated ware as “quadruple plate”  
—Oral evidence to connect advertisement with goods sold—Admissibility—Cr. Code 443, 446.*

1. The use of the words “quadruple plate” in an advertisement of sale of silverplated ware may constitute a false trade description, the application of which is an offence under Cr. Code sec. 446.
2. It is not necessary that a false trade description under Cr. Code sec. 446 should be physically connected with the goods or that it should accompany the same, and oral evidence is admissible to connect the description of the goods in the advertisement with the goods afterwards sold.

ARGUED : May 8, 1899.

DECIDED : December 5, 1899.

The defendants were convicted at the General Sessions of the Peace for the county of York, on the 14th of December, 1898, of having at Toronto on the 10th and 11th of June, A.D. 1898, and on other days and times since the 10th day of June, and before the finding of the indictment, unlawfully sold and unlawfully exposed for sale and unlawfully having had in their possession for sale, “certain goods, to wit, certain pieces of silverplated ware to which and to each of which a false trade description, to wit, the words or marks ‘quadruple plate’ had been applied contrary to the Criminal Code, sec. 446.”

A special case was reserved by McDougall, Co. J., the Judge before whom the trial took place for the opinion of the Court under sec. 743 of the Criminal Code.

The evidence and facts set out in the case were that the defendants inserted in the “Toronto Evening News” an advertisement which appeared in the issue of that paper of

Friday, the 10th of June, 1898. The advertisement after referring to certain goods for sale in the silverware department of the defendants' store at Toronto, contained the following statement :

"In the same section we're going to sell Tea sets, 4 pieces, quadruple plate, handsomely engraved, regular price \$12 a set, Saturday at \$6."

The advertisement was handed to the "News" by the defendants in the forenoon of Friday, June 10th, it being sworn that the defendants had then in their possession a number of tea sets to which the advertisement was intended to apply. On the 11th of June, 1898, a tea set was sold in the ordinary course of business to one John Impey, a witness for the Crown. Impey inquired if the tea set he was purchasing was one of the tea sets advertised as "quadruple plate," and was told by the saleswoman that it was, and that he could rely on the advertisement. Some tea sets similar to the tea set purchased by Impey were ordered by the defendants from the manufacturer after the advertisement was handed to the "News," and the evidence differed as to whether they were ordered on the afternoon of Friday, the 10th, or the forenoon of Saturday, the 11th of June. The manager of the manufacturing company swore that he received the order for tea sets of the same quality as the set sold to Impey on Friday, the 10th, and the manager of the defendants' silverware department swore that he directed the order to be telephoned to the manufacturer at 10 a.m. of the 11th of June. The tea set sold was proved not to be of the quality of the tea sets advertised.

TORONTO, May 8, 1899.

*Maclaren*, Q.C., for the defendants: The advertisement does not constitute the application of a trade description within the section. The use of the words "quadruple plate" is not a trade description within sub-secs. 3 and 4 of clause (b). It is not a description of the mode of manufacture or of the composition of the material. It was a mere

mode of puffing the goods. The definition of "quadruple plate" and "quality," as given in the standard dictionaries, shows that it cannot have the meaning contended for by the Crown. The next point is that the evidence does not show it applied to these goods. It is necessary to show that the trade description is connected with the goods sold. Verbal statements with regard to the matter are not sufficient. To connect the advertisement with the goods there must be something affixed to the goods sold so as to identify them with the representation. In *Budd v. Lucas* [1891] 1 Q.B. 408, which was a conviction for a false trade description on the sale of beer under a similar section to ours, the invoice accompanied the goods and contained the description on which the conviction was based. It was thus connected with the goods sold. In the case of *Coppen v. Moore* (No. 1) [1898] 2 Q.B. 300, at p. 304, which was a sale of hams, the invoice also accompanied the goods and contained the false description. In the present case there is nothing to connect the advertisement with the goods except the verbal statement of the saleswoman who sold the goods to the purchaser. This is not sufficient. There was no evidence to submit to the jury to show that the description applied to these particular goods. It is immaterial whether the goods were in the company's possession or not when the advertisement was inserted.

*J. R. Cartwright*, Q.C., for the Crown: The description contained in the advertisement was clearly applicable to the goods here. It is not necessary that the description should be physically connected with the goods. It is sufficient that the description should be reasonably and fairly connected with them. In the cases referred to of *Budd v. Lucas* [1891] 1 Q.B. 408, and *Coppen v. Moore* (No. 1) [1898] 2 Q.B. 300, the invoices were not attached to the goods but merely sent at the same time, and it was necessary in those cases that there should be evidence to connect the invoices with the goods; and so in this case evidence was properly admitted of the saleswoman to show that



these were the goods referred to in the advertisement and that they were sold in connection with the advertisement. This is sufficient under the statute. Then as to the other point. It is quite clear that the use of the word "quadruple plate" can have no other meaning than that contended for by the Crown. It is not, however, open to the defendants under the case reserved, as the case is based on the fact of "quadruple plate" being a trade description, and that it was false, and there was sufficient to show that the advertisement applied to these goods.

TORONTO, December 5, 1899.

MEREDITH, C.J.—

The questions submitted were the following :

" 1. Was the use of the words 'quadruple plate' by the defendant company in the said advertisement so inserted by the said company in the said "Evening News" an application of a false trade description to goods within the meaning of the fourth count of the said indictment, provided that the goods in question were not and could not be properly described as quadruple plate ?

" 2. Was there evidence to go to the jury on the above statement of facts that the description 'quadruple plate' in the said advertisement might refer to the tea set so sold to the said John Impey ?"

Upon the argument we were asked by Mr. Maclaren to consider and determine whether the description "quadruple plate" came within the definition contained in sub-sections 3 and 4 of clause (b) of section 443, which define "trade description" as meaning "any description, statement or other indication, direct or indirect, \* \* \*

(iii.) as to the mode of manufacturing or producing any goods,

(iv.) as to the material of which any goods are composed."

He contended that it did not ; and that the term "quadruple plate" was neither, but was merely a description of

the quality in the sense in which the words "handsomely engraved" are used in the advertisement of the goods referred to.

I do not think, however, that that question is open to the defendants. All that is submitted, as I understand the case, is (1) whether the advertisement in the newspaper could in law constitute an application of a trade description to the goods within the meaning of the Act ; and (2) whether there was evidence to go to the jury that the advertisement in fact applied to the goods.

The case assumes that the term "quadruple plate" was a trade description within the meaning of the Act, and that it was a false one. It is, moreover, on the evidence which is before us, impossible to say that the term "quadruple plate" is but a statement of quality in the sense in which I have mentioned ; and I do not know why the word may not be properly used as descriptive of the material of which a thing is composed, if not of the mode of manufacturing or producing it.

It is said by Mr. Justice Wright in *Coppen v. Moore* (No. 1) [1898] 2 Q. B. 300, at p. 304, that the Act does not apply to a trade description which is wholly verbal.

In *Budd v. Lucas* [1891] 1 Q.B. 408, and *Coppen v. Moore*, (No. 1) descriptions in the invoices accompanying the goods were held to be within the Act, the writing of the description in the invoice being, in the opinion of Mr. Justice Wright in the latter case, more than a verbal trade description.

Assuming the dictum of Mr. Justice Wright to be a correct statement of the law, as to which it is unnecessary to express an opinion, the description being contained in the advertisement in this case brings it within the principle upon which the two cases referred to were decided. In both of them oral testimony was required in order to connect the invoice with the goods, and I am unable to see why the description contained in the advertisement may not be held to be applied to the goods sold in this case, just as the invoices in those cases were. The only difference I can see is that the description in the one case is applied before, and the other

at or after the sale; but that can, I think, make no difference in the application of the principle.

With regard to the second question, the evidence was, I think, sufficient to justify the learned chairman submitting the case to the jury. Indeed, I do not see why, even if the defendant's account of the matter had been accepted, it was not open to the jury to come to the conclusion that the description contained in the advertisement was intended to apply as well to the goods obtained from the manufacturers on the Saturday as to those in the defendant's store on the Friday.

Both questions should, in my opinion, be answered in the affirmative.

MACMAHON, J., concurred.

ROSE, J. (dissenting)—

If we are to assume that the words "quadruple plate" constitute a trade description, then I think that on the question put to us, which assumes that the goods were not properly described as "quadruple plate," in other words that they were not "quadruple plate," we should answer the first question in the affirmative, because I am of opinion that what was done here was an application of a trade description to the goods.

Section 446 of the Criminal Code provides, in sub-sec. (d), that:—

"Every one is deemed to apply \* \* a trade description to goods who \* \*

(d) Uses a \* \* trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that \* \* trade description."

The advertising of the goods in question was, in my opinion, assuming the words amount to a trade description, the using of a trade description in a manner calculated to

lead to the belief that the goods were described by such trade description.

I am, however, unable to see that upon the case we can assume that the use of the words "quadruple plate" as stated in the question was an application of a trade description ; or in other words, that the words " quadruple plate " amount to a trade description, and I think before we can answer that question we must see upon the case that such words were a trade description. There is no statement upon the case that the words were a trade description. There was no finding by the jury of the fact, as far as the case states, and I cannot say that the use of the words " quadruple plate " was an application of a false trade description if I cannot see that such words were a trade description.

I find by section 443 "trade description" defined. It was not urged that sub-sections 1, 2, 4, or 5 of sub-section (b) of that section, apply at all to the case before us ; but what was urged was that the words "quadruple plate" was a " description, statement or other indication direct or indirect " " as to the mode of manufacturing or producing (any) goods." I do not think I can say as a matter of common knowledge or law that the words "quadruple plate" describe the mode of manufacturing or producing any goods. I do not know. It does not appear whether that question was discussed in the Court below or not, but certainly some evidence was required to satisfy the Court that these words described the mode of manufacturing or producing goods. That fact not being found, or not being stated, I am unable to answer the first question in the affirmative, and would send the case back to be amended or restated, under the provisions of section 745. On the case as now stated, I cannot agree to answer the question in the affirmative.

As to the second question, I think there was evidence to go to the jury upon the statement of fact submitted to us that the description "quadruple plate" in the said advertisement might refer to the tea set so sold to the said John

Impey, whether the set purchased by him was in the possession of the defendant company at the time of putting in the advertisement or was obtained by the company after the advertisement appeared, as long as the purchaser read the advertisement before the purchase and relied upon it, as there was evidence the purchaser here did.

*Conviction affirmed.*

**Note:** *False trade description—Proceedings against corporation—Practice.*

See *The Queen v. Eaton* (No. 1) 2 Can. Cr. Cas. 252, and Note 2 Can. Cr. Cas. 254.

[JUDICIAL COMMITTEE OF THE IMPERIAL PRIVY  
COUNCIL.]BEFORE LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON,  
AND SIR RICHARD COUCH.

## WENTWORTH v. MATHIEU.

*Temperance Act of 1864 (The Dunkin Act)—Successive complaints—Offences all prior to first complaint—Prosecutor's option to include in one complaint—Limitation of total of penalties—Complaint for single offence not presumed to include prior offences—Construction of statute.*

1. Section 17 of the Temperance Act of 1864 which provides that two or more offences by the same party may be included in one complaint, and that, whatever may be the number of offences included in one complaint, the maximum of penalty which may be imposed for them all shall in no case exceed \$100, is to be construed as permissive and not as imperative; and, if separate complaints are laid in respect of each offence, convictions obtained thereon with accumulated penalties of more than \$100 may be enforced, although the offences were all prior to the laying of the first information.
2. There is no presumption that a complaint made for a single offence under that Act is to include all offences to be charged against the accused thereunder previous to the date of the complaint and within the three months' limitation within which prosecutions are required to be brought.

ARGUED : December 19, 1899.

DECIDED : February 17, 1900.

Appeal from a judgment of the Superior Court of Quebec (May 5, 1899) which, by proceedings under a writ of certiorari, quashed a conviction under the Temperance Act of 1864, made on the complaint of the appellant against the respondent.

Between June 9 and July 20, 1898, the appellant preferred twenty-nine complaints and obtained twenty-nine convictions of the respondent, with penalties amounting to \$1400.

The respondent having duly paid the fine in respect of the first case, the Superior Court granted a writ of certiorari in the second, and quashed the conviction therein with costs.

The reasons given for the judgment of the Superior Court maintaining the writ of certiorari were that all the fines united amounted to a total of \$1400; that by s. 17 of the Act it was permitted to the complainant to include any number of offences in one complaint, but that the maximum penalty for them all should not exceed \$100; that it was the intention of the legislature to inflict a reasonable punishment; that the penalty of \$100 was considered a sufficient chastisement for all the offences committed up to the date of the institution of prosecution; and that a complaint laid at a certain date was under the statute presumed to include and to cover all the offences committed anterior thereto; and that therefore the magistrate, having convicted the accused in the first case, he was without jurisdiction to hear and determine any of the other complaints.

*Edward Blake, Q.C., and R. C. Smith, Q.C.,* for the appellant, contended that the convictions were right, and ought not to have been quashed. They were in accord with the uniform practice of the Magistrates' Court for twenty years. Section 13 of the Act imposes a penalty for each offence. Section 17, relied upon by the Court below, is permissive in its terms, and does not require that all offences committed by the same party anterior to the laying of the complaint should be included therein. Section 36 specially forbids the issue of any writ of certiorari in such cases: see also article 1290 of the Code of Civil Procedure.

*Panneton, Q.C., and Mayne,* for the respondent, contended that the right to a writ of certiorari always exists when there has been an excess of jurisdiction. The Magistrates' Court exceeded its jurisdiction in inflicting \$1400 penalties when no more than \$100 could be imposed under the statute. The object of s. 17 of the Act in limiting the amount of penalty to be imposed in the same complaint, no matter how many offences have been proved, has been nullified in this case. That provision has been evaded by presenting separate complaints in respect of each of several offences, and thereby an

indefinite amount of penalties is supposed to have been legalized.

*Blake, Q.C.*, replied.

LONDON, ENGLAND, February 17, 1900.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH.—

The question in this appeal arises upon an Act of the Legislature of Canada (27 & 28 Vict., c. 18), commonly called the "Temperance Act of 1864." Section 12 of this Act prohibits the sale of any spirituous or other intoxicating liquor unless it be for exclusively medicinal or sacramental purposes, or bona fide use in some art, trade, or manufacture. Section 13 is as follows: "Whoever by himself, his clerk, servant or agent, exposes or keeps for sale, or directly or indirectly, or on any pretence, or by any device, sells or barter, or in consideration of the purchase of any other property, gives to any other person any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage and a part of which is spirituous or otherwise intoxicating, in violation of the twelfth section of this Act, shall incur a penalty of not less than twenty or more than fifty dollars for each such offence, and whoever in the employment or on the premises of another so exposes or keeps for sale, or sells, or barter, or gives in violation of the said section, shall be held equally guilty with the principal and shall incur the same penalty." Section 17 provides that two or more offences by the same party may be included in one complaint provided the time and place of each offence are stated; but whatever may be the number of the offences included in one complaint the maximum of penalty imposable for them all shall in no case exceed \$100.

In June, 1898, the appellant made a complaint to the District Magistrate for the District of St. Francis in the Province of Quebec that the respondent, on or about April



23 then last past, had sold and delivered intoxicating liquors and received payment for the same contrary to this Act, whereby he had become liable to pay \$50 with costs. On June 30, 1898, the respondent was convicted by the District Magistrate of having on April 23 then last sold and delivered to one George Mount intoxicating liquors contrary to the Act, and adjudged to forfeit and pay to the appellant \$50, to be applied according to law, and also to pay \$29.76 for costs. On July 13, 1898, the appellant made a similar complaint to the same magistrate of an offence committed by the respondent on April 19 then last past, and the respondent was on July 20, 1898, convicted of selling intoxicating liquors to one J. H. P. Armitage on April 19 contrary to the Act, and adjudged to forfeit and pay to the appellant \$50, to be applied according to law, and 90 cents for costs.

In addition to these convictions, there were at different times between June 8 and July 21, 1898, twenty-seven other convictions of the respondent on the complaints of the appellant by the same magistrate of similar offences committed on different days between March 26 and May 19, the penalty in each case being \$50.

On September 15, 1898, the Superior Court of Lower Canada on the petition of the respondent ordered a writ of certiorari to issue, and on April 5, 1899, the writ was issued in the case of the second of the convictions before mentioned, namely, for the sale on April 19 to Armitage, being No. 526 in the records of the Magistrates' Court. A return having been made to the certiorari, the Superior Court on May 5, 1899, pronounced its judgment annulling the conviction, and on July 14, 1899, Her Majesty by an Order in Council gave the appellant special leave to appeal against this judgment upon the appellant submitting to pay the costs of this appeal incurred by the parties on both sides in any event if it should appear advisable to the Judicial Committee so to direct when the appeal came on for determination, and also to abide by any recommendation which their Lordships might see fit to make as to the enforcement of penalties by the appellant against the respondent.

The judgment of the Superior Court delivered by Lemieux, J., appears from his reasons for it, which are in the record, to be founded on the opinion that according to s. 15 the legislature thought that the penalty of \$100 was sufficient punishment for all the breaches of the law up to the time of the prosecution and during the three months previous to it, that being the limitation of time from the committing the offence for the prosecution for it, and that the complaint of June 9 covered and included all offences previous to that date; that as one or more offences of the same nature against the Act could be included in the same prosecution, a complaint made at a particular date for a single offence is presumed to be made and to comprehend all the offences against the Act up to the date of the complaint. Their Lordships are quite unable to agree with the Superior Court in this opinion. It is an addition to s. 15 for which there is no authority either in the words of it or by implication. The purpose of s. 17 appears to be to prevent a prosecution under the Act where only one offence is charged failing by reason of the evidence not being sufficient to prove it, or in consequence of a variance in the complaint from the evidence of the time when or the person to whom the intoxicating liquor was sold if more than one offence has been committed, and the limit of the penalty to \$100 indirectly restrains the use of that power. There is no reason for thinking that "may" is to be imperative, and the same as "shall." There is nothing which shows it is intended to have other than its natural meaning. If, as the Superior Court was of opinion, the legislature thought a penalty of \$100 was sufficient punishment for all offences committed within three months previous to the complaint, their Lordships do not doubt that it would have said so and provided for it. The learned judge supported his opinion by references to Russell on Crimes and the American and English Encyclopædia of Laws, in which the principle is laid down that "where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea of *autrefois acquit* is generally good." The meaning of this is that where the

same facts would justify a conviction for two different offences (say, burglary and petty larceny), a man who has been convicted for one offence cannot be tried over again on the same facts for the second offence. This principle has no application to the present case. Evidence that the defendant supplied liquor to B. at a given hour and place would not support a complaint that he supplied liquor to A. at another hour or place, notwithstanding that both complaints might have been included in one proceeding. Their Lordships are not aware of any general principle in criminal law which would support the view of the Superior Court. The magistrate has a discretion as to the amount of the penalty between \$20 and \$50, and where, as in the present case, there are many complaints by the same person of separate offences, it would be right to exercise it. They are therefore of opinion that the conviction of the respondent should not have been quashed, and will humbly advise Her Majesty to reverse the judgment of the Superior Court.

Their Lordships note with satisfaction the statement of the learned counsel for the appellant that the penalties on the conviction of the respondent will not be enforced, but they do not think it necessary to include a recommendation to that effect in the report which they will make to Her Majesty. In pursuance of the undertaking of the appellant on the leave to appeal, their Lordships direct the appellant to pay the respondent's costs of this appeal to be taxed as between solicitor and client.

*Appeal allowed.*

[COURT OF GENERAL SESSIONS, COUNTY OF  
YORK, ONTARIO.]BEFORE HIS HONOR, JOSEPH E. McDOUGALL, COUNTY JUDGE,  
CHAIRMAN OF SESSIONS.

## THE QUEEN V. VALLEAU.

*Medical registration—"Practising medicine," meaning of—  
Diagnosis—Manual manipulation—Massage—Ont. Medi-  
cal Act, R.S.O. 1897, c. 176, s. 49.*

1. A professed diagnosis of an ailment, followed by a manual manipulation of the patient, for reward, as a means of curing disease is not "practising medicine" under the Ontario Medical Act.

DECIDED : June 20, 1900.

Appeal from a conviction for practising medicine without registration under the Ontario Medical Act, R.S.O. 1897, c. 176.

*Curry, Q.C.*, for the Crown.

*Geary*, for the defendant.

TORONTO, June 20, 1900.

McDOUGALL, Co. J.—

The defendant appeals from a conviction for an alleged contravention of the Medical Act, by practising medicine without being duly registered. The defendant gave no medicine or drug, nor did he prescribe any. His methods appear to have been to question people who applied to him as to some of their symptoms, but he professed to cure only by rubbing with the hands and by suggestion that they were cured. The patient frequently professes to be relieved or to feel better as the result of this manipulation or the suggestion, or both. It might well happen that in a case of nervous disease, which often arises from mental conditions, the mere suggestion that a cure had been effected, especially

in a case where the patient had been led to hope for alleviation by the reported success of the operator, would act as effectively as the administration of drugs. The defendant made a charge for each treatment given by him. He advertised his alleged marvellous cure, and many people visited him. Amongst them the complainant and a witness named Duncan, both of whom gave evidence before the magistrate. The complainant is the prosecutor employed by the Ontario Medical Council.

At the argument before me it was agreed that the evidence taken before the magistrate should be the sole material to be considered on the appeal. Mr. Curry contended that if the defendant had omitted to question the patient as to his symptoms, and had only rubbed the patient and told him he was cured, such action, even if he charged for the rubbing or the time occupied, would not amount to an offence against the Act. It is manifest that if rubbing a patient for hire, without more, amounted to a practising of medicine, every masseur could be prevented from following his calling, unless he was duly registered as a medical practitioner. If Mr. Curry's contention be correct, such masseur would become liable to the penalties of the Act if he overstepped the line by asking his patient where his aches or pains lay, or questioned him as to his symptoms, even with the object of treating the patient more intelligently and successfully by the application of his physical treatment. Mr. Curry contends that there was an offence committed the moment the defendant catechised the would-be patient and asked him if he had some stomach or lung trouble or any trouble in his head. This alleged effort to diagnose, he says, was a practising of medicine, bringing the culprit within the penal clauses of the Act. In other words, if a masseur employed to rub you asks you where your pain is, or inquires if you have a pain in any part of your frame, which you have failed to voluntarily disclose, such indiscreet curiosity would bring the masseur within the prohibition intended by the Act.

I am of opinion from the facts disclosed in evidence in this case that there was no practicing of medicine. No

medicine was prescribed, nor any remedy suggested to be taken. From what the patient told the defendant, the defendant said: "There is nothing the matter with you but a little stomach trouble, and that I can cure by rubbing with the hand." He told the witness Duncan, so Rose the complainant swears, "that he cured by animal magnetism or electricity passing from his body to the person who is sick." Rose says that after this explanation, "the defendant rubbed his hands together and then applied them for 15 or 20 minutes to Duncan's body. He then told Duncan he was cured and he was to tell everybody who asked him that he was cured." He says again: "He did not prescribe any medicine for Duncan, nor give any medicine of any kind. He told Duncan to use good, wholesome food, to get lots of fresh air and drink water." The witness Duncan's evidence is to the same effect as Rose's in every particular.

Diagnosing only, or professing to diagnose, without prescribing a remedy or medicine, has never yet been held to be a practising of medicine. In *Regina v. Howarth*, 1 Can. Cr. Cas. 14, and *Regina v. Coulson*, 27 Ont. R. 59, it was the prescribing of medicine or drugs after questioning the would-be purchaser as to symptoms that was held to amount to a practising of medicine. Any man may go into a chemist shop complaining of feeling unwell and describe his symptoms in detail, even in answer to questions by the chemist; yet, if the chemist does not suggest or recommend a particular drug or remedy appropriate to the supposed physical trouble or disturbance, there would be no practising of medicine. A person, in order to render himself liable for practising medicine under the Medical Act, must have, for gain, prescribed or recommended for trial a particular remedy selected by himself as appropriate to the symptoms described by the patient. If the patient selects a remedy for himself, making up his own mind as to what he ought to take, there is no offence. A druggist is allowed, it appears, to state fully the qualities and properties of two or more remedies, and even to say which in his opinion is the better remedy or compound, but he must stop short of recommending which

remedy the patient had better take for his alleged trouble or complaint : *Regina v. Coulson*, supra.

I dispose of this appeal upon the short ground that no medicine was prescribed. Manual manipulation of a patient for reward with the object of curing disease, even where it follows upon a close inquiry from the patient as to his symptoms, is not, in my opinion, a practising of medicine within either the letter or spirit of the Ontario Medical Act.

The appeal will be allowed and the conviction will be quashed with costs.

*Conviction quashed.*

**Note :** For other cases under medical registration statutes, see *R. v. Howarth*, 1 Can. Cr. Cas., 14 and note page 22, *R. v. Coulson*, (No. 1) 1 Can. Cr. Cas., 114, *R. v. Coulson*, (No. 2) 1 Can. Cr. Cas. 118, and *R. v. Barnfield*, 3 Can. Cr. Cas. 161.

## [SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE MCCOLL, C.J., AND DRAKE, IRVING, AND MARTIN, JJ.,  
SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

## THE QUEEN V. PETRIE.

*Gaming—Card game of “black jack”—Advantage to dealer  
—Deal determined by chances of the game—Common gaming  
house—Chances “not alike favorable to all the players”  
—Cr. Code 196 (b), 198.*

1. The game of “black jack” is a game of chance, and a place kept or used for playing it, although not kept for gain, is a common gaming house under Cr. Code, sec. 196 (b).
2. The keeping of a house, room or place for playing a game of chance or mixed game of chance and skill in which the chances of the game are in favor of the player who is the dealer or banker therein for the time being, is an indictable offence under secs. 196 and 198 of the Criminal Code, if the position of dealer or banker passes from one player to another by the chances of the game and not by rotation.

ARGUED : January 25, 1900.

DECIDED : February 9, 1900.

Case reserved for the Court of Appeal by Irving, J., pursuant to section 743 of the Criminal Code as follows :

“The prisoner was convicted before me under the Speedy Trials clauses for keeping a common gaming house. I convicted him ; but at the request of the prisoner’s counsel, reserved the following questions :

“(1.) Was the building in the rear of the Savoy rented by Petrie from Innes, Richards & Ackroyd, as shown in the evidence herein, a house, room or place kept or used for playing therein at any game of chance or any mixed game of chance and skill?

“(2.) Was the game which was being played, as shewn in the evidence, in said building at time of Petrie’s arrest a game in which ‘a bank is kept by one or more of the players exclusively of the others?’

“(3.) Was the game which was being played, as shewn in the evidence, in said building at time of Petrie’s arrest ‘a



game the chances of which are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet ? ' ' "

" I found against the prisoner on each of these points.

" Should the court be of opinion, (*a*) That the first question ought to be answered in the negative, or (*b*) That both the second and third questions ought to have been answered in the negative, the conviction will be quashed unless the court is of opinion that the conviction can be supported as an offence at common law. I reserved sentence."

Black jack was the game played and the following description of the game as played was agreed on by counsel at the trial :

" The game is played by two or more players and generally with one pack of cards. After determining among themselves, the players, either by lot or otherwise who shall be dealer, the bets are made before any cards are dealt. The dealer then deals two cards to each player and two to himself, one at a time, but two are dealt to each player and two to himself, and if on examining his own hand he finds he has a black jack, that is to say, any one of the court cards or a ten-spot with an ace, he takes in all the bets that are made, except some one or more of the players have also a black jack as just described, in which case no money passes between those two. Assuming that he has not a black jack, beginning with the player on his left he asks them whether or not they will take cards. They then looking at their own hands decide in their own minds after examining the number of pips, whether they will draw cards. The cards are turned face up, and if the player has more than twenty-one he is 'bust' and the bet is taken by the dealer without reference to the number in his own hand. This goes on through all the players, some deciding to stand on their own hands without drawing cards, others drawing one or more. The dealer then determines whether or not he will draw cards, and whether he pays or

receives from the other players who have not 'busted' is determined by the nearness to the number twenty-one. If he 'busts,' that is, if he draws more than twenty-one, he pays all those that have a lesser number who have not already paid him. If any player other than the dealer has a black jack, the dealer not having a black jack or twenty-one, composed of a court card, a ten spot and an ace, the player so having a black jack takes the deal."

VANCOUVER, B.C., January 25, 1900.

*Davis, Q.C.*, for the prisoner: The English Acts are different and are aimed at unlawful games, but section 196 of the Code aims only at the games therein mentioned. The game here played was alike favourable to all the players; it may be that after the deal is obtained the dealer has an advantage, but it must be remembered that the chances of obtaining the deal are equal. The fact that the deal begins and changes by chance instead of rotation does not alter the case. The dealer is not strictly speaking a "banker;" but assuming he is he cannot keep it exclusively of the others. Only a certain kind of bank is aimed at by the Code such as when under the rules of the game there are certain players who never could get the bank, *e.g.*, roulette.

*Wilson, Q.C.*, for the Crown: In *Jenks v. Turpin* (1884), 13 Q.B.D. 505, baccarat was decided to be unlawful, and baccarat and black jack are the same game except that the object in the former is to get nine whereas in the latter it is to get twenty-one. The intention of the Code is to strike at all banking games, and the mere fact of the bank passing from hand to hand does not take it out of the category of games in which a bank is kept by one or more of the players exclusively of the others. He cited *Fairtlough v. Whitmore* (1895), 64 L.J. Ch. 386.

*Brydone-Jack*, on the same side: It is an offence at common law. He cited *Reg. v. Shaw* (1887), 4 Man. R. 404;

*The King v. Dixon* (1795), 10 Mod. 336; *The King v. Rogier and Humphrey* (1823), 25 R.R. 393; *Hamilton v. Massie et al* (1889), 18 Ont. R. 598; *Arthur v. Bokenham* (1796), 11 Mod. 150; *The Queen v. Ashton* (1852), 1 E. & B. 289; *Patten v. Rhymmer* (1860), 3 E. & E. 1 and *Regina v. Ah Pow* (1880), 1 B.C. R. (Part 1) page 151.

*Davis*, in reply: Apart from the question as to whether the common law applies when the subject is specially dealt with in the Code, we have here a statutory offence defined, and even were the charge laid under the common law the offence would have to be that defined in the Code; it could not be said, *e.g.*, that there could be two kinds of murder. He distinguished *Jenks v. Turpin*, *supra*; there, there was nothing in the rules to compel a player to take the bank in his turn—he could refuse it; but here, he must play the bank in his turn.

VICTORIA, B.C., February 9, 1900.

MCCOLL, C.J.—

The last clause of section 196 of the Code contains, as a definition of a common gaming house, one “in which any game is played, the chances of which are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet.

It is admitted that the person, who may be sufficiently described as the banker, in the game in question has at least a slight advantage over the other players, and it is certain that his and their chances are not equal. That the advantage may be slight; that each player has an equal chance of securing it; and that it can be obtained only in the course, and by means of the game itself, cannot, in my opinion, make any difference. The point is that the banker, while banker, has some advantage, or is under some disadvantage, and this is, it seems to me, just what is forbidden.

It was urged that the persons aimed at are only those who are bankers by some arrangement outside of the game. But they are provided for by the clause immediately preceding the one now under discussion. That clause relates to a house, etc., "in which a bank is kept by one or more of the players exclusively of the others." And, apart from this, the rule applicable to the construction of the Code is thus stated by Lord Herschell in *The Governor and Company of the Bank of England v. Vagliano Brothers* [1891], A.C. at pp. 144 and 145: "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities."

The language of the particular clause in question has not any settled technical meaning nor is it of uncertain import, and therefore applying to it this rule I have no doubt that the conviction ought to be affirmed.

DRAKE, J.—

The defendant was convicted of keeping a common gaming house. There is no evidence that the defendant kept the room for gain, and this part of the case was abandoned.

The Code, by section 196, sub-section (*b*), defines a common gaming house as a house, room or place kept or used for playing therein any game of chance, or mixed game of chance or skill, in which a bank is kept by one or more players exclusively of the others, or in which any game is played the chances of which are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play or bet.

The game played in the defendant's room to which the public were admitted indiscriminately was called black jack.

## [COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J.

## THE QUEEN v. RACINE.

*Summary trial—No right of appeal except on trial by two justices under Cr. Code 782a (5)—Code amendment of 1895—Cr. Code 782, 783.*

1. No appeal lies from the decision of a Judge of the Sessions, Police Magistrate, District Magistrate or other functionary mentioned in Cr. Code sec. 782a (1), holding a "summary trial" under Cr. Code 783.

MONTREAL, January 3, 1900.

WÜRTELE, J.—

George S. Cuvillier laid an information against the respondent, Francois A. Racine, charging the respondent with having stolen the sum of \$3.30 which belonged to him. The charge was heard and determined in a summary way under the provisions of part LV. of the Criminal Code, relating to the summary trial of indictable offences, by his Honor F. X. Choquet, one of the judges of the Sessions of the Peace for the City of Montreal, and it was dismissed and a certificate of such dismissal was given to the accused.

The private prosecutor was dissatisfied with the decision, and he has appealed the case to this court. When the case was called, the parties adduced their evidence and were heard on its merits; and the case was then taken under advisement. On examining the record I found that there was a preliminary objection which had to be decided before the merits of the case could be looked into. It is as to whether there is an appeal from the decision of a judge of the Sessions of the Peace who acts and holds a summary trial under the provisions of part LV. of the Criminal Code.

This court has no inherent authority or right to entertain appeals from the decisions of justices of the peace, of recorders, of judges of the Sessions of the Peace, of police magistrates and of district magistrates, and it can only do so when the authority and power are specially conferred. The right of appealing only exists when it is given by statute law, either expressly or by necessary implication, and the machinery to be employed must be distinctly pointed out. The common law confers no such right.

Neither the Criminal Code nor any statute of the Parliament of Canada grants the right to appeal from the decision of a recorder, of a judge of the sessions, of a police magistrate or of a district magistrate, who, in the Province of Ontario, Quebec or Manitoba, has acted under the provisions of part LV. of the Criminal Code and has held a summary trial for an indictable offence. The right of appealing to this court from the decision of a justice of the peace or of two or more justices of the peace, of a judge of the sessions, of a recorder, of a police magistrate or of a district magistrate, who has acted under the ordinary summary jurisdiction which is conferred upon them, either convicting or dismissing the defendant, is specially conferred by section 879 of the Criminal Code.

But in the case of the summary trial of a person charged with the commission of an indictable offence before one of the magistrates or functionaries mentioned in sub-paragraph (1) of paragraph (a) of section 782 of the Criminal Code, not only is the right of appeal not given and conferred but it is in fact expressly declared that none exists. Section 798 of the Criminal Code enacts that every conviction under part LV. of the Criminal Code, which relates to the summary trial of indictable offences, shall have the same effect as a conviction upon indictment for the same offence. Now no appeal of right under the common law or under the statute law exists from the verdict or the conviction of a jury, and as this state is one of the effects of a conviction upon an indictment, it necessarily follows that it is also one of the effects

of a conviction upon such a summary trial, and that there is no appeal from such a conviction.

Then section 799 declares that every person who is dismissed and obtains a certificate of dismissal under the provisions of the part of the Criminal Code relating to the summary trial of indictable offences, shall be released from all further proceedings for the same cause. Under this section the dismissal is therefore final so far as regards the merits of a case, and consequently an appeal is precluded and debarred.

I have already stated that the only right of appeal to this court on its Crown side is the right of appeal from the decisions of justices of the peace and of the other magistrates whom I have mentioned when acting in the exercise of their ordinary summary jurisdiction, and that the authority and power to entertain such appeals is conferred upon it by section 897 of the Criminal Code. If the part of the Criminal Code relating to summary convictions, being part LVIII., or at least the sections of that part which relate to appeals, had been made applicable generally to proceedings respecting the summary trial of indictable offences, the right of appealing from the decision of a judge of the sessions, or of one of the other magistrates or functionaries mentioned in the sub paragraph which I have referred to, when acting under the provisions of part LV. of the Criminal Code and trying in a summary way an indictable offence, would have been granted to any person deeming himself aggrieved by such decision, and the authority and power to entertain such an appeal would have been conferred upon this court; but far from making the part of the Criminal Code respecting summary convictions, or any of its sections, applicable generally to proceedings under the part respecting the summary trial of indictable offences, section 808 expressly declares and enacts that the provisions of part LVIII. shall not apply to proceedings in the summary trial of indictable offences.

There is therefore no right of appeal on the merits of a case from the decision of a judge of the sessions or of any

other magistrate or functionary mentioned in sub-paragraph (1) of paragraph (a) of section 782 when he has acted under the jurisdiction conferred on him for the summary trial of certain specified indictable offences.

There is only one exception to this rule. It is contained in an amendment to section 782 of the Criminal Code, which was enacted on the 22nd July, 1895, and which added a new sub-paragraph to paragraph (a), providing that in all the provinces, where the defendant is charged with any of the offences mentioned in paragraphs (a) and (f) of section 783 (which are theft, false pretences, receiving stolen property and keeping and being an inmate of a house of ill-fame) any two justices of the peace sitting together have jurisdiction to hear and determine such charge in a summary way, and that when an offence is tried under this new sub-paragraph, being sub-paragraph (5), an appeal should lie from their conviction in the same manner as from summary convictions under part LVIII. The right of appeal given by this new enactment is not a general right but is a special and specific one, which is limited to cases where two justices of the peace have acted together with respect to the offences mentioned in paragraphs (a) and (f) of section 783, and the amendment does not therefore alter the general rule respecting the judges and other functionaries mentioned in sub-paragraph (1) of paragraph (a) of section 782, nor does it confer any right of appeal from the convictions rendered by them. The right of appeal thus given is exceptional and the effect of this exceptional right of appeal is to strengthen the force of the general law which does not allow appeals. The right of appeal given by the legislative power is specific and it implies prohibition outside of the specification; and the court cannot therefore add to the law a right of appeal which the parliament has not given.

This being the case, I have no authority or power to entertain the appeal in the present matter, and I therefore dismiss it for want of jurisdiction; but as the objection was



not raised by the respondent, the appeal is dismissed without costs and each of the parties will bear his own.

*Appeal dismissed.*

*Cornellier & Hubert*, for the private prosecutor.

*Charles A. Wilson*, for the respondent.

*Cooke, Q.C.*, Crown prosecutor.

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., GRAHAM, E.J., AND MEAGHER, J.

## THE QUEEN v. JAMES GIBSON.

*Speedy trial—County Judges' Criminal Court—Electing trial without a jury—"Committed to jail for trial," meaning of—Admission to bail under Cr. Code 601 without a committal—Render by sureties—Transmission of depositions—Waiver of preliminary examination—Effect of, on claim to a speedy trial—Officer de facto—Cr. Code 600, 601, 765, 767, 910.*

1. Where upon a preliminary enquiry the justice finds that the evidence is sufficient to put the accused on his trial, and that it does not furnish such a strong presumption of guilt as to warrant a committal for trial (Cr. Code 601), and the accused is in consequence admitted to bail upon finding sureties for his appearance to answer an indictment, but is subsequently rendered to the jail by the sureties under Cr. Code 910, the person so rendered is not "committed to jail for trial" within the meaning of Cr. Code 765, and cannot be tried under the Speedy Trials Clauses at the County Judges' Criminal Court.
2. A judge's order under Cr. Code 910, authorizing the sureties to render the accused to jail, is not equivalent to a warrant of commitment to jail for trial for the purposes of the Speedy Trials Clauses.
3. An accused person committed in default of finding sureties, under Cr. Code 601, is not committed "for trial" but "until delivered according to law," and cannot be tried at the County Judges' Criminal Court.
4. Where the accused is admitted to bail under Cr. Code 601 without being committed for trial, the depositions need not be transmitted by the justice, under Cr. Code 600, to the officer of the court in which an indictment is to be preferred.
5. *Semble*, an accused person may, upon a preliminary enquiry, waive the preliminary examination into the charge and consent to be committed for trial without any depositions being taken; but as the "charge" in the County Judges' Criminal Court must be prepared from the depositions (Cr. Code 767), the accused, committed without depositions having been taken, has no right to elect to be tried at the County Judges' Criminal Court.

ARGUED : April 7, 1896.

DECIDED : May 18, 1896.

The defendants were arrested under a charge of having assaulted Donald A. Farquharson, a peace officer, engaged

in the execution of his duty. A preliminary enquiry took place before a justice of the peace. The defendants were admitted to bail in the first instance and were not committed to jail, nor committed for trial by the justice.

After being so admitted to bail, one of the sureties made application to the judge of the County Court, having jurisdiction under the Speedy Trials Clauses in that county, for orders to render the defendants to the common jail of the county of Hants, under section 910 of the Criminal Code, and an order was made accordingly. The order, amongst other things, directed the keeper of the jail "to receive the defendants and imprison them in the said jail and there keep them until they were discharged by due course of law." They were afterwards brought before the same learned judge, under the provisions of the Code relating to Speedy Trials.

Mr. Christie, the prosecuting officer under chapter 7 of the Acts of 1887, appeared, and, before the defendants elected, objected on behalf of the Crown to the jurisdiction of the judge to try them. He contended (1) that the defendants had never been committed to jail for trial upon any charge, (2) that the justice had not committed them, (3) that the order to render was not a committal, and (4) that they had never been committed to jail for trial on any charge within the meaning of section 765 of the Code.

The defendants elected to be tried by the judge referred to, pleaded not guilty, and were by him convicted of the offence with which they were charged. Two questions were stated in the case reserved, namely :

1st. Had the learned judge below jurisdiction, under the circumstances stated in the case, to try the defendants.

2nd. Was Farquhar, the constable, a peace officer engaged in the execution of his duty, at the time of the assault.

HALIFAX, April 7, 1896.

*W. E. Roscoe*, Q.C., for defendants : The judge had no power whatever to arraign the defendants who were not

prisoners in jail : Criminal Code 601. The Code only provides for trial by the judge of the county court where the defendant is committed for trial, not where he is admitted to bail. If a condition precedent has not been complied with, the proceedings are without jurisdiction. Endlich on Statutes, sections 435-443. [GRAHAM, E.J.—The question is whether there was not a committal by virtue of the order made by Chipman, C.C.J.] Crim. Code, sections 765, 766, 767. The committal must be by a justice. There must be a charge. A mere order to render will not do. An officer de facto has no official character. In the interests of the public an official character is given to his acts. *Green v. Burt*, 23 Wend. 503; *State v. Hooker*, 17 Vermont 658, cited in Waterman on Trespass, Vol. 1, p. 128. A person must be a legal officer before an action will lie for resisting him. *Conlon v. The City Railway*, 2 N.S.D. 234. Where proof is given to show that a man has acted as an officer, evidence may be given to show that he has not acted. In the case of *State v. Carroll*, 38 Conn. 449, the limitation is recognized that while the acts are recognized as being valid, the de facto officer has not the right to insist upon his act being done. In English law no officer is recognized as an officer de facto unless he has been appointed by a valid authority, or one publicly assumed to be valid, or has required a reputation in office.

*F. T. Congdon*, contra : The effect of the order of the county court judge is the same as if the defendant had failed to give bail in the first instance, and had been committed by warrant of the magistrate. Code, sections 600, 910, 915. Section 80 requires the council to appoint a sufficient number of constables. The appointment of a number implies an opinion that that number is sufficient. Where a vacancy happens, the warden and councillors may appoint under section 50. It was not necessary for the warden and councillors to come together for the purpose of making the appointment. The officer was an officer de facto by color of appointment. This may be derived from appointment by

persons who have no legal right. The assault was committed after the process was served. There is nothing to show that the officer was not leaving as promptly as possible. As to appointment of de facto officers, Taylor on Evidence, Vol. 1, secs. 171, 189, 431.

*Roscoe*, Q.C., replied.

HALIFAX, May 18, 1896.

MEAGHER, J.—

The facts relating to Farquharson's position, so far as material, are that he was not appointed a constable by the municipal council, but by the warden and three councillors under the provisions of section 50, of chapter 3, of the Acts of 1895, entitled, "of county incorporation." It was contended that his appointment was invalid; that section 50 did not relate to constables or officers of that class, the number to be appointed not being fixed by the statute, but only applied to pound keepers, overseers, health officers, etc., etc., whose number is prescribed by the statute; and, assuming that he was an officer de facto, still the defendant could not be convicted, because the section of the Code dealing with that class of offence did not extend to officers de facto, and that he was not such an officer.

*Green v. Burke*, 23 Wend. 503, was strongly relied on by the defendants' counsel, but it is quite distinguishable. In that case the officer, after levying under an execution, but before sale, discovered that his appointment might be held to be invalid, and, fearing the consequences to himself, he returned the property seized to the debtor, and delivered the process back to the justice who gave it to him. A fresh execution was issued, and other property of the debtor was seized and sold, and out of it the suit of *Green v. Burke* (replevin) arose. It was argued that the first levy operated as a satisfaction of the judgment, but it was held otherwise. I cannot perceive that that case determined any principle

necessarily affecting the present enquiry. The case of the *State v. Hooker*, 17 Vermont 658, cited at length in a note to Waterman on Trespass, Vol. 1, page 128, turned upon the fact that the breaking by the officer, which preceded the arrest, was unlawful, and therefore the arrest which followed it was unlawful. Some general observations, it is true, were made as to the necessity for an officer being a legal one, in order to enable him to justify under process, but the question how far, if at all, an officer de facto could justify in such a case, was not before the court. I do not, therefore, see that it can be regarded as of any special value in the present case. The term "legal officer" used in that case could, with great propriety, be applied to an officer de facto in a great many instances, and in relation to most, if not all, of the acts of such an officer, outside of those immediately affecting himself. No case was cited directly in point, but the principle has long been recognized and acted upon that the acts of officers de facto are valid as respects the public and the rights of third persons, and it is not permissible to assail the title of such officers in a collateral proceeding. *The People v. Hopson et al*, 1 Denio (New York) Reports 573, is a clear and distinct authority against the defendants on this branch of the case. The defendants were tried upon an indictment which charged them with assault and battery, and resisting an officer in the execution of process, and were convicted. A new trial was moved for on a bill of exceptions. Bronson, Ch.J., who delivered the judgment of the court, said :—

"The next question is on the offer to show that Lascells (the officer entrusted with the execution of the process) had not taken the oath of office or given security, and so was not a legal officer. The evidence would be proper if Lascells, instead of The People, was the party complaining of an injury. If he were suing to recover damages for the assault, it would probably be a good answer to the action that he was not a legal officer, but a wrong-doer who might be resisted. And, clearly, he cannot recover fees or set up any right of property on the ground that he is an officer de

facto, unless he be also an officer de jure : *Riddle v. County of Bedford*, 7 Lef. & Rawle, 386 ; *Keyser v. McKissan*, 2 Rawle 138 ; *Fowler v. Beebe*, 9 Mass. 231 ; *Green v. Burke*, 23 Wend. 490 ; *People v. White*, 24 Wend. 526. When one man attempts to exercise dominion over the person or property of another, it becomes him to see that he has an unquestionable title."

"But it is equally well settled that the acts of an officer de facto, though his title may be bad, are valid so far as they concern the public or the rights of third persons who have an interest in the things done. Society could hardly exist without such a rule. I will only refer to two or three cases where many of the others have been collected. *People v. Stevens*, 5 Hill. 630 ; *Green v. Burke*, 23 Wend. 490 ; *Taylor v. Skrine*, 2 Const. Rep. S.C. 696. Now, here, though Lascells is a witness, he is not a party, nor is this a proceeding for his benefit. The people are prosecuting for a breach of the public peace, and it is enough that Lascells was an officer de facto having color of lawful authority. The rights of the creditor, the due administration of justice, and the good order of society, all concur in requiring that he should be respected as an officer until his title has been set aside by due process of law. The evidence offered was properly rejected."

In *The People v. Collins*, 7 Johns. Rep. 548, it was held that a mere ministerial officer has no right to decide on the acts of a de facto officer, or adjudge them to be null, because the acts of such an officer de facto who comes into office by color of title are valid, as it concerns the public or third persons who have an interest in his acts. The court there said :—

"They (the parties whose acts were alleged to be invalid) were commissioners de facto, since they came to their office by color of title ; and it is a well-settled principle of law that the acts of such persons are valid when they concern the public or the rights of third persons who have an interest in the act done ; and this rule is adopted to prevent the failure of justice. The limitation to this rule is as to such acts as

are arbitrary and voluntary, and do not affect the public utility."

In *Wilcox v. Smith*, 5 Wend. 231, the court said :—"The principle is well settled that the acts of officers de facto are as valid and effectual when they concern the public or the rights of third persons as though they were officers de jure. The affairs of society could not be carried on upon any other principle. . . ."

"It will be observed that these cases do not go upon the ground that the claim by an individual to be a public officer, and his acting as such, is merely prima facie evidence that he is an officer de jure ; but the principle they establish is this : that an individual coming into office by color of an election or appointment is an officer de facto, and his acts in relation to the public or third persons are valid until he is removed, although it be conceded that his election or appointment was illegal. His title shall not be enquired into. The mere claim to be a public officer, and the performance of a single or even a number of acts in that character would not, perhaps, constitute an individual an officer de facto. There must be some color of an election or appointment, or an exercise of the office and an acquiescence on the part of the public for a length of time, which would afford strong presumption of at least a colorable election or appointment."

See also Cooley's Constitutional Limitations, s. 599 ; *Attorney General v. Crocker*, 138 Mass. 217, where the subject is fully discussed ; *Morris v. The People*, 3 Denio (N.Y.) 391 ; Angell and Ames on Corporations, s. 286 and 287 ; and *Casey v. Smith*, 26 N.S.R. 177.

The constable, Farquharson, was acting, to say the least, under color of appointment. The assault was made immediately after he served the summons, and before he left the presence of the defendants. The defendants were therefore aware that he professed to be a constable, and was acting as such when assaulted. The public were interested in the proceeding or suit in which the service of the summons was made. It was a prosecution in relation to a criminal matter. The service of the summons was effective even if the



constable was an officer *de facto* only and not *de jure*. I can see no reason whatever for holding that an officer, whose acts as to the public and the parties to the proceedings are valid, should not be entitled to the same measure of protection against assaults and ruffianism, while in the discharge of his duty, as one whose title to the office he professes to fill was indisputable. There is in this connection another consideration of greater importance than the mere protection of the officer, and that is the preservation of peace and order and the prevention of breaches of the peace. The law would be brought into disrepute and cease to be protective if parties served with process were permitted to take the law into their own hands, and determine for themselves that the officer serving it had not been properly appointed and they were therefore at liberty to assault him, as in this case, violently. I am happy to be able to say that the law, as I understand it, does not tolerate such conduct, and that these defendants cannot avail themselves of the contention made on their behalf.

The only question remaining for consideration is as to the jurisdiction of the learned judge who tried them. The procedure with respect to the preliminary inquiry before a justice and the committal or discharge of a party accused of an indictable offence may, so far as material to the present inquiry, be summarized as follows :

Section 595 provides that if, upon the whole evidence, the justice is of opinion that no sufficient case has been made out to put the accused upon his trial, he shall discharge him.

Section 596 requires the justice, if he thinks that the evidence is sufficient to put the accused on his trial, to commit him for trial. The warrant of commitment prescribed by that section directs the constable to take the accused to the jail therein named, "and to deliver him there to the keeper thereof, together with the warrant"; and commands the keeper to receive him into his custody in the said jail, "and there safely keep him until he shall be thence delivered in due course of law."

Under section 600 the justice is required "as soon as may be after the committal of the accused," to transmit to the clerk, or other proper officer of the court by which the accused is to be tried, the information, if any; the depositions of the witnesses; the exhibits; the statement of the accused; all recognisances, and also any depositions taken before a coroner which may have been sent to the justice.

It is, amongst other things, provided by section 601 that when any person appears before a justice charged with an indictable offence punishable by imprisonment for a term less than five years, and the evidence adduced is, in the opinion of such justice, sufficient to put the accused on his trial, but does not furnish such a strong presumption of guilt as to warrant his committal for trial, the justice before whom the accused appeared may admit him to bail upon his procuring and producing such surety or sureties as, in the opinion of such justice, will be sufficient to ensure his appearance at the time and place when and where he ought to be tried for the offence.

The justice acted upon this provision, and did not commit them for trial.

By the provisions of section 598, the justice, if he commits the accused for trial, may bind over to prosecute some person willing to be so bound, and shall bind over every witness whose deposition has been taken, and whose evidence in his opinion is material, to give evidence at the court before which the accused is to be indicted; and by section 779 it is enacted that recognisances given under section 598 shall respectively bind prosecutors and witnesses, in case the person committed for trial elects to be tried under those provisions of the Code which relate to speedy trials, the same as if such recognisances had been originally entered into for the doing of such things with reference to such trials.

Section 910 enables any surety for any person charged with an indictable offence, upon affidavit showing the ground therefor, together with a certified copy of the recognisance, to apply to a judge, etc., and to obtain from him an order in writing under his hand to render such person to the common

jail of the county where the offence is to be tried ; and by sub-section 2 thereof it is further enacted that the sureties under such order may arrest such person and deliver him with the order to the jailer named therein, who shall receive and imprison him in the said jail, and shall be charged with the keeping of such person until he is discharged by due course of law.

Section 765 of the Code enacts that " every person committed to jail for trial on a charge of being guilty of any of the offences which are mentioned in section 539, . . . may with his own consent (of which consent an entry shall then be made of record), and subject to the provisions herein, be tried in any province under the following provisions out of sessions and out of the regular term or sittings of the court before which, but for such consent, the said person would be triable for the offence charged."

Section 766 provides " that every sheriff shall, within twenty-four hours after any prisoner, charged as aforesaid, is committed to jail for trial, notify the judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon, with as little delay as possible, such judge shall cause the prisoner to be brought before him."

Section 767 provides that :—The judge, upon having obtained the depositions on which the prisoner was so committed, shall state to him—

(a) That he is charged with the offence, describing it ;

(b) That he has the option to be forthwith tried before such judge, without the intervention of a jury, or to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction.

2. If the prisoner demands a trial by jury, the judge shall remand him to jail ; but if he consents to be tried by the judge without a jury, the county solicitor, clerk of the peace or other prosecuting officer, shall prefer the charge against him for which he has been committed for trial, and if upon being arraigned upon the charge the prisoner pleads guilty,

the prosecuting officer shall draw up a record as nearly as may be in one of the forms, MM or NN, in schedule 1, etc.

There does not appear to be any provision in the Code which requires the justice, in cases where he discharges the accused or where, acting under the provisions of section 601, he bails him and does not commit him, to transmit the depositions to any court or officer ; nor is there any provision enabling an accused party to waive the preliminary examination, and consent to be committed for trial. Such a course would however, I suppose, be open to the accused. In the latter case there would be no depositions, while in each of the former cases mentioned there would be no depositions available on the files of the court for the judge to have recourse to in order to enable him to comply with the requirements of the Act when the accused comes before him for election.

It is, I think, clear that the learned judge had no jurisdiction in the present case to try the accused, inasmuch as they had not been committed for trial. The court created for the purpose of trying parties under the provisions of the Code relating to speedy trials, is not a court of general jurisdiction but one of limited statutory jurisdiction. If the power to try the accused, under the circumstances which appear in this case, cannot be found within the statutory provisions of the Code in this behalf, it does not exist.

Section 766, as I feel myself obliged to read it, authorizes the sheriff to notify the judge only in cases where the accused has been committed to jail for trial. If there has been no committal for trial, he is neither empowered nor required to give the notification in question to the judge.

In this case it would have been impossible for the sheriff to have complied with section 766. There were no depositions on file nor any information ; the only document he had cognizance of was the order for surrender, and that made no reference to the charge against the accused.

The judge, in order to comply with the terms of section 767, must obtain the depositions on which the prisoner was committed to jail for trial. He could not do so in this case,

for the reason that the parties never were committed to jail for trial, and therefore there were no such depositions in existence. For the same reason, the judge could not state to the prisoner that he was charged with the offence, nor could he describe it to him. The "offence" referred to in sub-sec. (a) of section 767 can only, I take it, mean the offence described in the depositions. The judge is under no obligation to refer to the warrant of commitment. He is only required to refer to the depositions, and therefore it must be from these that he ascertains the offence.

It will be seen by reference to sub-sec. 2 of section 767 that the solicitor of the county, clerk of the peace, or other prosecuting officer, shall, if the prisoner consent to be tried by the judge, prefer the charge against him for which he has been committed for trial. The form prescribed, in case he pleads guilty, recites the fact of his being a prisoner in the jail, "committed for trial on a charge," etc.

There cannot be an election on the part of the accused nor can there be a charge prepared or preferred by the prosecuting officer, clerk of the peace, etc., under the provisions before us, unless there are depositions on the files of the court, and the party has been committed to jail for trial. If these conditions exist, then, under section 773, the prosecuting officer may, with the consent of the judge, prefer against the prisoner a charge or charges for any offence or offences for which he might be tried under the provisions of that part of the Code, other than the charge or charges for which he was committed to jail for trial. This is supplemented by section 774, which enables the judge, in any case tried before him, to convict him of any offence other than that charged against him as a jury might.

Every section relating to the election of the accused and his trial before the county court judges' criminal court, professes to deal, and to deal only, with cases where he has been committed to jail for trial, and therefore I think that, subject to the provisions of section 773 and section 774, and perhaps some others I may not have observed, there is only jurisdiction under the sections relating to Speedy Trials to

try offences for which there has been a committal to jail for trial. The order for surrender cannot by any possibility be regarded as the equivalent of a warrant of commitment to jail for trial for the purpose of the provisions under review.

The conviction must, therefore, be quashed. As at present advised, I see no difficulty in the way of their being indicted and tried in this court. It is, I think, a matter for regret that the learned judge below did not act upon the doubts he experienced and decline to try the accused.

RITCHIE, J., concurred.

GRAHAM, E.J.—

The jurisdiction of the county court judges' criminal court extends only to persons "committed to jail for trial" on the charges specified in the provisions of the Code relating to speedy trials of indictable offences: sections 765, 766, 767. In this case the defendants, who were charged with an assault upon a peace officer in the discharge of his duty, were brought before a justice of the peace, and there was a preliminary inquiry. On the preliminary inquiry the justice did not "commit" them "for trial" under section 596 of the Code, but he proceeded under section 601. This provides that when any person appears before any justice charged with an indictable offence, etc., etc., and the evidence adduced is, in the opinion of such justice, sufficient to put the accused on his trial, but does *not* furnish such a strong presumption of guilt as to warrant his committal for trial, the justice, jointly with some other justice, may admit the accused to bail upon his procuring and producing such surety or sureties as, in the opinion of the two justices, will be sufficient to ensure his appearance at the time and place when and where he ought to be tried for the offence; and therefore the two justices shall take the recognizances of the accused and his sureties, conditioned for his appearance at the time and place of trial and that he will then surrender and take his trial and not depart the court without leave.

Sections 596 and 601 are in one section in the Imperial Act, 11 & 12 Vic., c. 42, sec. 22, and there the alternatives of the justices are quite clear and in contrast.

Now, supposing (1) that the defendant cannot find bail, in my opinion the justice does not thereupon alter his judgment and commit the defendant under section 596; he commits him to jail for want of sureties. The mittimus, or warrant of commitment, is to keep the prisoner in custody for want of sureties or until he be discharged by due course of law: 4 Chitty's Blackstone, p. 300, n. 11. But, technically, he is not committed for trial; therefore, he cannot be tried in the county court judges' criminal court.

(2) Then, if he finds bail and the sureties afterwards are desirous of rendering him, and obtain an order under section 910, he is in custody for want of sureties and not committed for trial under section 596.

In *Courtauld v. Tigh*, L.R. 4 Ex. 130, Cleasby, B., said: "And it is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament." In *Ex parte Kent v. Dover*, [1891], 1 Q.B. 393, Williams, J., said:—

"It is contrary to the general rules of construction to give a different meaning to the word borough in different portions of the same section, but this may be done where the sense of the section clearly requires it."

In this case there is no sufficient reason for departing from this rule. Prima facie, it would appear to be a reason that in the case of a man not committed for trial, he is not to have a speedy trial in the county court, while the man who was committed has that privilege. But possibly the case of a man whose criminality is so doubtful as not to warrant a committal not being able to obtain sureties, is so rare that there is no provision for covering his case. And here the defendants apparently surrendered in order to select that tribunal.

*Regina v. Burke*, 24 Ont. R. 72, was referred to. There the defendants had been committed by the justice, but

had given bail. When they were rendered, MacMahon, J., said they stood in the same position as if they had never been bailed, and were, therefore, "committed to jail for trial."

For want of jurisdiction the convictions must be quashed.

Having reached this conclusion, it appears to me unnecessary to decide the other point urged against these convictions, namely, that Farquharson, the constable, being at most a de facto officer, was not an officer within the meaning of this statute, that this refers only to legal officers—officers who are compelled by law to undertake duties which may result in danger.

I refrain because it is a difficult question, even in the United States where the cases respecting de facto officers have outrun the English cases. In Bishop on Criminal Law, sec. 464, under the head "Resisting or assaulting Officers de facto," it is said:—

"The difficult question is whether third persons are indictable for resisting or for the aggravated offence of assaulting a mere officer de facto. And, though the decisions on it are not harmonious, the better opinion is that they are, the law not permitting them to test in this way the claim to an office of one who exercises it under an apparent right. Other methods of testing the right are open."

It refers, among other cases, to *State v. Hopton*, 1 Denio (N.Y.) 573, and *United States v. Wood*, 1 Gallison 361, the latter a decision of Story's. The indictment was for resisting one Lewis, an inspector of the customs, in the execution of the duties of his office. At the trial it appeared that Lewis was duly appointed an inspector of the customs by the late collector of Boston, since whose resignation he had been re-appointed to the same office by the present collector, but the alleged resistance took place after the resignation of the former collector, and before the re-appointment of Lewis, he having continued to act under his old commission. Story and Davis, JJ., held that the indictment could not be sustained. In *Commonwealth v. Dugan*, 12 Met. 234, Shaw, C.J., declined to decide that point, having decided another



which disposed of the case. In *State v. Hooker*, 17 Vt. 658, referred to at the argument, Chitty on Criminal Law is cited. In Vol. I, p. 60, it is said :—

“If the warrant be itself defective, if it be not enforced by a proper officer, or if it be executed out of the jurisdiction, without being backed by the proper magistrate . . . the party may legally resist the attempt to apprehend him, and even third persons may lawfully interfere to oppose it, doing no more than is necessary for that purpose.”

In *King v. Owen*, 5 East 308, Lord Ellenborough said :—

“For if a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more, etc.”

However, I expressly abstain from expressing any opinion upon the subject.

*Conviction quashed.*

**Note :** *Meaning of “committed to jail for trial” — Cr. Code 765.*

See the next case, *The Queen v. Smith*, in which this case is approved and followed by Ritchie, Townsend, Meagher and Henry, JJ., and the decision contra by the present Chief Justice of British Columbia, in *The Queen v. Lawrence*,<sup>1</sup> Can Cr. Cas. 295 is dissented from. Legislation has, however, been introduced, which adopts the latter view ; see Appendix to this volume.

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, TOWNSHEND, MEAGHER AND HENRY, JJ.,  
SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

## THE QUEEN v. SMITH.

*Speedy trial—Election of, by accused—Right limited to cases where “committed to gaol for trial”—Admission to bail by magistrate without a committal—Judge’s order for render by sureties—Cr. Code 596, 601, 765.*

1. In order that an accused should have the right to elect to be tried without a jury at the County Judges’ Criminal Court, he must have been “committed to gaol for trial” (Cr. Code 765), and the County Judges’ Criminal Court has no jurisdiction in a case where the magistrate admitted the accused to bail in the first instance under Cr. Code 601, without an order of committal.
2. The committal referred to in sec. 765 of the Criminal Code is a committal by the magistrate and does not include a judge’s order made under Cr. Code 910 for the render of the accused to gaol at the instance of his bondsmen.
3. Consent does not confer jurisdiction, and the accused may, upon an appeal by way of case reserved, object to the jurisdiction of the tribunal he has himself selected.

*The Queen v. Gibson*, ante p. 451, followed; *The Queen v. Lawrence*, 1 Can. Cr. Cas., 295, dissented from.

ARGUED : November 23, 1898.

DECIDED : December 3, 1898.

Case reserved for the opinion of the court by the judge of the county court for District No. 1 as follows :—

“The stipendiary magistrate of the City of Halifax, at the close of the preliminary examination, found as follows : Defendant is put on trial, bail fixed, herself in \$100, and one surety in \$100, and took the recognizance of Sarah Smith and her surety that she should appear at the next court of oyer and terminer and general jail delivery, and surrender herself to the keeper of the jail, and plead to such indictment as might be found against her by the grand jury. Before the meeting of the supreme criminal court, the surety surrendered the said Sarah Smith to jail. After she was in jail

the sheriff notified me of the fact under s. 766 of the Code, and I then, under s. 767, had her brought before me, stated the charge to her, and called upon her to elect whether to be tried under the Speedy Trials Act, or go to the supreme court and be tried, when she elected to be tried under the Speedy Trials Act, and the question for the opinion of the court is :

1. Whether, after having submitted herself to the jurisdiction of the county court judges' criminal court, and having stood her trial, it was not too late for her, after the trial, to object to the jurisdiction she had herself selected ?"

HALIFAX, November 23, 1898.

*J. J. Power*, for the prisoner : Under Crim. Code, s. 601, accused was put upon her trial and admitted to bail. Accused was then rendered to jail, and, under an order of the county court judge, was brought before him, for election, under the Speedy Trials Act. The Speedy Trials Act does not apply to any case except where there is an actual committal for trial, and is not applicable where accused was put on trial under s. 601. *The Queen v. Gibson et al*, [ante, p. 451] 29 N.S.R. 4 ; Crim Code, s. 755.

*Hon. J. W. Longley*, Attorney-General, contra: If a party put upon his trial, and bailed by the magistrate, surrenders himself to jail, then he is in jail awaiting trial, and the sheriff is bound to report him, and the judge is bound to try him if he elects to be so tried. The same thing follows if he is rendered to jail. *The Queen v. Burke*, 24 Ont. R., 64; *The Queen v. Lawrence*, 1 Can. Crim. Cas. 295. [HENRY, J.—It seems to me that the only difference between committing for trial and putting on trial is a matter of bail in the first instance ; otherwise a party put upon trial only is in a worse position than if he were committed for trial in the event of his not being able to get bail.]

*J. J. Power* in reply.—The same words are used in s. 601, and in s. 765 of the Code.

HALIFAX, December 3, 1898.

The judgment of the court was delivered by

TOWNSHEND, J.—

This question was before the court in *The Queen v. Gibson et al*, 29 N.S.R. 4, [3 Can. Crim. Cas. 451] under precisely the same circumstances, except that the Crown there objected to the trial of the prisoner before the county court, for want of jurisdiction. After an elaborate argument the court, composed of Ritchie, Graham and Meagher, JJ., held that the defendants, not having been committed for trial under the Code, s. 596, the judge of the county court had no jurisdiction to try them, and the conviction must be set aside. This case, I take for granted, was not brought to the notice of the judge below, or he would certainly not have tried the defendant when there was a decision of the court against his jurisdiction. It is now contended by the Attorney-General for the Crown that this decision was erroneous, and demands reconsideration. In support of his contention two cases were cited. *The Queen v. Burke*, 24 Ont. R. 64, and *The Queen v. Lawrence* (1896), 1 Can. Cr. Cas. 295, decided by McColl, J., Supreme Court of British Columbia. In the latter case we have presented the arguments and grounds relied on for upholding the right of the county court judge, under circumstances like those in *The Queen v. Gibson*, and the present case, and the learned judge cites, in support of his reasoning, *The Queen v. Burke*. He says :—

“I am of opinion, however, that the accused has the right which he claims, on the ground that the words in s. 765, ‘committed to jail for trial,’ should not be confined to the technical or restricted sense contended for, but as meaning any case where the accused is found in custody charged with an offence of this kind, in respect of which the right of election is given. The settled practice in the province has been to allow such election, although the accused has never been received into custody at all, except in the way of his

surrender merely for the purpose of appearing before the judge for election, and the case of *Reg. v. Burke*, 24 Ont. R. 64, is authority, if other authority be wanted, that this practice is correct."

It is to be observed that in *Reg. v. Burke*, the defendants were "committed for trial," and admitted to bail, and afterwards surrendered, and it was held that :—

"When the defendants were surrendered by their bail, they stood in the same position as if they had never been bailed, and were, therefore, 'committed to jail for trial.'"

This, in an important respect, distinguishes the case from *The Queen v. Lawrence* and *The Queen v. Gibson*, as well as the present case, and due weight does not appear to have been given to that difference by the learned judge in *The Queen v. Lawrence*. Neither can I admit the force of his reasoning when he says :—

"A construction which would place the accused in a worse position, when the evidence against him is slight, than if overwhelming, and would permit a magistrate, in any case, if so inclined, to deprive the accused of the right to elect, is not, of course, one from which I ought to shrink, merely because of such possible result, but it is proper to consider possible consequences in determining the question."

With all respect, I think we are not justified in departing from the plain language of the statute, especially where the statute only gives jurisdiction under certain clearly specified conditions, and while we may regard the possible consequences, no law, nor construction, within my knowledge, gives the court jurisdiction, unless the statute confers it, no matter how inconvenient the consequence may be. Now, s. 765 of the Code, says :—"Every person committed to jail for trial on a charge, etc."

In this case, as well as in the *Lawrence* case, the accused was dealt with under s. 601, which says :—

"And the evidence adduced is, in the opinion of such justice, sufficient to put the accused on his trial, but does not furnish such a strong presumption of guilt as to warrant his

committal for trial," he may be admitted to bail, etc. The accused was, by the magistrate, bailed for trial, but was not committed. As he was not committed to jail for trial, it seems too clear for doubt that s. 765 does not cover this case, and the county court judge could not have jurisdiction. As already observed, *Regina v. Burke*, 24 Ont. R. 64, is not an authority to the contrary, and, so far as I can see, does not, by analogy, sustain the contrary view, because the defendants were, in that instance, "committed for trial."

But, there are other provisions in the Code which lend weight to the contention against the jurisdiction of the county court judge, which have, apparently, been overlooked by the learned judge in *The Queen v. Lawrence*. These are set out at length in the judgment of Mr. Justice Meagher in *The Queen v. Gibson*, and commented upon, and so far as my opinion goes, the reasons assigned for the decision in that case, both by Mr. Justice Graham and Mr. Justice Meagher, seem unanswerable. Certainly nothing said in *The Queen v. Lawrence* at all combats successfully the grounds on which they are based.

It is quite probable that it would be both convenient and an improvement in the administration of the criminal law, should parliament extend this right to cases like the present, but, if we are to regard the object in view, in passing such legislation, it is quite apparent that it was not intended to apply to persons out on bail. It was evidently intended to afford persons confined in jail on certain criminal charges a speedy opportunity of having their guilt or innocence determined, instead of being confined, often for long periods, until the courts of oyer and terminer and general jail delivery should sit at their regular terms in the counties. While we should give a liberal construction to statutes enacted for the improvement of criminal procedure, no rule of interpretation will allow us to enlarge the meaning of a statute giving jurisdiction to cases not clearly within its terms. I may remark, in conclusion, that the "committal to jail for trial," which confers the jurisdiction, is to be by the magistrate,

and not the order of the county court judge when the party is surrendered by his bail. In that case he is not committed for trial, but for want of sureties to appear and take his trial.

The court is, therefore, of the opinion that the prisoner, not having been committed for trial, had not the right of electing to be tried by the county court judge, and he, therefore, had no jurisdiction, even with her consent, to try her.

*Conviction set aside.*

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[COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J.

**THE QUEEN v. ROY.**

*Common bawdy house—Disorderly house—Offence of keeping—Criminal liability of owner leasing house for purposes of prostitution—Aiding and abetting—Accessory chargeable as a principal—Cr. Code 61 (b) 195, 198.*

1. The owner of a house who leases it to another person knowing and assenting when the lease was made to the purpose of the latter to maintain it as a common bawdy house, thereby does an act for the purpose of aiding the lessee to commit the indictable offence of keeping a disorderly house, and he may be indicted and convicted as a principal under Cr. Code sec. 61 (b).

MONTREAL, June 23, 1900.

WÜRTELE, J.—

In this matter a reserved case has been transmitted to the Court of Queen's Bench by Mr. Recorder Weir with reference to the criminal responsibility of the owner of a house which has been leased, and is subsequently used by the lessee for purposes of prostitution.

On the 4th day of December, 1899, the accused, Blanche Roy, leased her house on St. Charles Borromée Street, in

the City of Montreal, to one Florida Lemieux. The case states that Blanche Roy, the accused, had been known for many months to have been a prostitute, and to have kept the house in question as a house of ill-fame, and that she knew, at the date of the lease, that Florida Lemieux proposed to use the house as a disorderly house.

The lessee Florida Lemieux at once entered into possession of the house leased to her and it was afterwards visited from time to time by the accused, and on the 31st day of January, 1900, the lessee was convicted of having kept the house for about two months previously to the 29th day of that month as a disorderly house.

On the 9th day of February, 1900, an information was laid before Mr. Recorder Poirier by constable Isidore Trudeau, charging the accused with having on the 4th day of December, 1899, rendered herself a party to the indictable offence committed by Florida Lemieux, as the actual perpetrator, of keeping a disorderly house in the house which she had leased to her, inasmuch as she had so leased it to her on the day mentioned for the purpose of aiding her to keep a disorderly house.

The cause proceeded to trial before Mr. Recorder Weir, but no judgment was rendered as the accused applied for and obtained a reserved case on the point whether the leasing of the house in question by her to a person for purposes of prostitution rendered the accused herself guilty of the offence of keeping and maintaining a disorderly house.

The case states that the proof established that the accused leased the house to Florida Lemieux on the 4th of December, 1899; that she was known to have been for many months past a prostitute and to have kept the house in question as a house of prostitution prior to leasing it to Florida Lemieux; that after leasing it she visited the place from time to time and knew the character of the house; that Florida Lemieux was convicted on the 31st day of January, 1900, of having for about two months previously to the 29th day of that month kept a disorderly house in the premises in question;



that the accused knew when leasing the house, that Florida Lemieux, the lessee, proposed to use it as a disorderly house ; and that the latter did so use it as is established by her conviction.

The case submits for the opinion and judgment of the Court of Appeal the following question :

“ Is Blanche Roy, under the facts above stated, guilty of having kept a disorderly house on the 4th day of February, 1900 ? ”

But the question of law really submitted for the opinion of this Court is :

“ Whether the leasing of the house in question by the accused Blanche Roy to Florida Lemieux for the purposes of prostitution renders the accused herself guilty of maintaining a disorderly house ? ”

Under the rule of our criminal law, as contained in section 61 of the Criminal Code, every one is a party to and guilty of an offence who actually commits it, or who does an act for the purpose of aiding any person to commit the offence, or who abets any person in commission of the offence. The effect of this enactment is that persons who do anything for the purpose of aiding another person to commit an offence, or who abet another person in commission of an offence, are themselves considered guilty of the offence and become liable to be prosecuted, tried, convicted and punished as if they had themselves committed it.

Did the accused do any act in leasing her house to Florida Lemieux, who afterwards kept it as a disorderly house, and who was convicted of so doing, to bring herself under this rule, and to render her criminally responsible for the offence committed by her lessee ? This is really a question of fact to be decided by the jury or the judge, as the case may be, and is not a question of law to be decided by this Court on an appeal on a question of law.

Section 61 of the Criminal Code makes any person who does an act for the purpose of aiding any other person to

commit an offence, or who abets any other person in commission of an offence, a party to the offence committed by such other person. To abet is to be personally or constructively present at the commission of an offence, and to assist in the criminal act ; but to aid is to help, or in any way to promote, facilitate or bring about the accomplishment of any criminal purpose by another, and this may be done without being present when the offence is perpetrated. Under the old rule of law the abettor, or the person who was present inciting or helping, was a principal in the second degree, while the person who, being absent, counselled, helped or facilitated in any way the commission of an offence which was afterwards perpetrated was an accessory before the fact.

The following quotations will show the difference between an abettor and an accessory before the fact :

Wharton's Criminal Law, sections 234 and 235 : " What distinguishes the act of the accessory from that of the principal is that the accessory while concerned in facilitating the execution of the guilty purpose, takes no part in the execution, leaving it to the principal. There is no particular period of time to which accessoryship is limited. It may take place when the guilty act is concocted, when it is prepared, or when it is executed, provided that in the latter case there is not actual presence."

Taschereau's Commentaries on the Criminal Code, page 36 : " An accessory before the fact is he who being absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony. If the party be actually or constructively present when the felony is committed he is an aider and abettor, and not an accessory before the fact, for it is essential to constitute the offence of accessory that the party should be absent at the time the offence is committed."

1 Russell on Crimes, page 170 : " An accessory before the fact is he who being absent at the time the offence is committed doth yet procure, counsel, command or abet another to commit a felony. And it seems that those who by showing

an express liking, approbation or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it, that he could not be encouraged by the hopes of any immediate help or assistance from them, are accessories before the fact."

1 Bishop's Criminal Law, No. 673 : " An accessory before the fact is a person whose will contributes to a felony committed by another as principal, while himself too far away to aid in the felonious act."

To aid is among other acts to furnish to another the means to effect a purpose which such other person has in view. If in this case, the accused leased her house to Florida Lemieux, knowing and assenting to her purpose to use it as a disorderly house, she would have aided her in her design ; and under the old rule of law would have been an accessory before the fact ; but now, under the new rule, she would become a party to the offence which was afterwards committed by her lessee.

Mr. Justice Taschereau in his Commentary on section 61 of the Criminal Code says : " This section is so framed as to put an end to the nice distinction between accessories before the fact and principals in the second degree. All are now principals in any offence and punishable as the actual perpetrator of the offence, as it has always been in treason and misdemeanour. The prosecutor may, at his option, prefer an indictment against the accessories before the fact and aiders and abettors as principal offenders."

The rule of law now is that any person who before the commission of an offence does something to aid in its being committed, or to help or to facilitate its commission, or to furnish the means to accomplish its commission, although he may not be present when the offence is actually perpetrated, may be treated and dealt with as a principal, and such a person falls directly under paragraph (b) of section 61 of the Criminal Code as having done an act for the purpose of aiding any person to commit an offence ; then the person who

under the old rule of law would have been principal in the second degree by abetting the perpetrator in the commission of an offence, falls under paragraph (c) and may likewise be dealt with as a principal.

If the owner of a house leases it to another person for the purpose of keeping a disorderly house, or does so with the knowledge and with his concurrence that it is to be so used and kept, he, in leasing the house would aid the lessee to commit the offence of keeping a disorderly house, and he consequently under the present rule of our criminal law would become liable equally with the actual offender for the offence committed and he would be prosecuted, tried, convicted and punished as a principal. In such cases, the indictment, or the information, may either simply charge the accessory or aider with the offence committed by the person aided, or may state, as in the present case, the aid which was given and charge the accessory's or aider's participation by reason thereof in the offence committed.

Unless however the owner of a house knew when executing a lease that it was to be used for purposes of prostitution he cannot be held criminally responsible for the offence which may afterwards be committed by the lessee. Complicity with the lessee or knowledge of and assent to the purpose to make an illegal use of the house leased is the essential element which makes the owner a party to the offence committed by the lessee—is in fact the very gist of the offence. With such complicity or knowledge and assent, the owner becomes a party to the offence, and without the one or the other he cannot be involved in it, incurs no criminal responsibility for the offence of keeping a disorderly house committed by his lessee, and is not a party to it. In order to make the owner a party to the offence committed by the lessee, there must be participation in it, either by complicity or concurrence with lessee or from knowledge of the lessee's criminal design and implicit assent thereto.

The question submitted at the end of the case for the opinion of the Court of Appeal asks if the accused could be found guilty of having kept a disorderly house on the 4th day

of February, 1900, which is after the date of Florida Lemieux's conviction. The charge, however, is that she had rendered herself responsible for the keeping of a disorderly house on the 4th day of December, 1899, and had become guilty of that offence, because she had aided Florida Lemieux to commit the offence by leasing her house to her. The date of the 4th day of December, 1899, as that of the commission of the offence is given in both the information and the charge which have been produced with the case, and which form part of it, and the date of the 4th day of February, 1900, mentioned in the question is evidently a clerical error, and the date should be that mentioned in the information and in the charge. But whatever may be the date of the commission of the offence laid in the information and in the charge, whether it is stated to have occurred on the 4th day of December, 1899, or on the 4th day of February, 1900, it is immaterial as it is unnecessary to prove the time of committing the offence as laid in the information or in the charge, unless the particular time is material and of the essence of the offence, which it is not in this case. It is sufficient to prove that the offence was committed on a day anterior to the finding of the indictment or to the laying of the information. In the present case, the offence of keeping a disorderly house appears to have been committed continuously from the 4th day of December, 1899, to the 29th day of January, 1900, and this is sufficient under the law as respects the statement of the time of the commission of the offence.

It is for the jury or judge, as the case may be, to consider the evidence and to find what facts and circumstances have been established. When a question is raised as to the application of the law to the facts and circumstances which have been proved and found, the judge in the case which he submits to the Court of Appeal, states the facts and circumstances which he finds have been proved and established and the court applies the law to the facts and circumstances so stated; the court accepts them as stated and decides the question of law which has been raised with respect to the application of the law to them.

In the present case, the recorder states in the case submitted to the Court of Appeal that it had been proved and that he found that Blanche Roy had leased her house to Florida Lemieux on the 4th day of December 1899, that both were known to have been prostitutes, that Blanche Roy had kept the house as a house of prostitution, and that she knew when she leased the house to Florida Lemieux that the latter proposed to use it as a disorderly house, and that she did so use it as a disorderly house for about two months previously to the 29th day of January, 1900.

Substantially the question of law submitted by the recorder is whether under these facts and circumstances Blanche Roy can be found guilty of keeping a disorderly house in a house of which another was in possession, but which she had leased to the person in possession with the knowledge that she purposed to use it as a house of ill-fame or prostitution?

Guilty knowledge involves virtual intention, and if therefore Blanche Roy had express knowledge of Florida Lemieux's intention and design in leasing the house to use it for purposes of prostitution, she, in leasing her house, would have done an act which would have aided her lessee to commit the offence of keeping a house of ill-fame, in other words, her conduct in leasing her house with such guilty knowledge would have therefore amounted to active encouragement of the commission of the offence. The recorder's province is to find the facts, and it is for him to find whether the accused Blanche Roy when she leased the house had knowledge of the lessee Florida Lemieux's intention and design, whether she leased the house to her for purposes of prostitution. The recorder has to decide the question of fact and it is for the court to decide the question of law which arises in the case.

We are of opinion, and we hold, as a question of law, that a person who leases a house to another for purposes of prostitution, renders himself, under the provisions of the Criminal paragraph (b) of section 61 of the Criminal Code, a party to and guilty of the offence afterwards committed by his lessee of keeping a disorderly house, although he was not

himself the keeper, and that he can be prosecuted, tried, convicted and punished in the same manner as the actual keeper; and we order an entry to that effect to be entered on the record.

The formal order of the court was thereupon issued whereby it was adjudged and declared that in the opinion of the court:

“A person who leases a house to another for purposes of prostitution, renders himself under the provisions of paragraph (b) of section 61 of the Criminal Code, a party to and guilty of the offence committed subsequently to the leasing of his house by his lessee, of keeping a disorderly house, although he was not himself the keeper, and that he can be prosecuted, tried, convicted and punished for such offence in the same manner as the actual keeper; leaving to the recorder to decide whether in the present case the defendant Blanche Roy leased her house to Florida Lemieux for purposes of prostitution.”

And it was ordered that the present judgment of this court be duly certified and that it be transmitted to the proper officer of the Recorder's Court of the City of Montreal before which the case against the defendant Blanche Roy was tried.

*J. P. Cooke, Q.C.*, crown prosecutor.

*Saint Pierre, Wilson & Pélissier*, for defendant.

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE THE HONORABLE SIR JOHN ALEXANDER BOYD,  
CHANCELLOR AND PRESIDENT, THE HONORABLE MR. JUSTICE  
ROBERTSON, AND THE HONORABLE MR. JUSTICE  
MEREDITH, SITTING AS A COURT OF APPEAL FOR CROWN  
CASES RESERVED.

## THE QUEEN v. KEMPEL.

*Accusing with intent to extort—"Accuse," meaning of—Laying  
information before judicial tribunal, included—Cr. Code  
405, 558.*

1. Where an information for rape or other offence under Cr. Code 405 is laid with the sole intent to extort money or property from the person against whom the charge is made, the informant thereby "accuses" such person with intent to extort or gain something from him under Cr. Code 405; and commits an indictable offence thereunder.

ARGUED : February 20, 1900.

DECIDED : April 6, 1900.

Crown case reserved and stated under sec. 743 of the Criminal Code by the senior County Judge of the County of Bruce.

The prisoners were brought up for trial before the Judge in the County Judges' Criminal Court and there tried upon a charge that they "did unlawfully accuse one John Rumigh with having, on the 22nd day of May last at Mildmay, by force and against her will, feloniously ravished and carnally known one Philopena Kempel, a woman above the age of twelve years, with intent in so doing to extort a valuable security for money, and did compel the delivery thereof by the said John Rumigh to the said Ruhland and Kempel"—the prisoners—"in violation of section 405 of the Criminal Code, 1892."

Both the prisoners were convicted of the offence charged.

The Judge found upon the evidence that the prisoners, with the sole intent to extort something from Rumigh, laid



an information for rape against him before one Kleist, a justice of the peace, had a warrant issued thereon, and caused Rumigh to be arrested by a constable and brought before Kleist; that the prisoners took two promissory notes from Rumigh while he was under arrest, and then called in Kleist, who, upon the prisoner Kempel saying that he had no witnesses, dismissed the charge with costs, which were paid by Rumigh; and that at the time of laying information Kempel probably believed that Rumigh had committed some offence against Kempel's wife, but not rape, and probably did not understand the legal meaning of the words in the information.

Section 405 of the Criminal Code is as follows:

"Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to extort or gain anything from any person—

"(a) accuses or threatens to accuse either that person or any other person, whether the person accused or threatened with accusation is guilty or not, of

"(i) any offence punishable by law with death or imprisonment for seven years or more;

"(ii) any assault with intent to commit a rape, or any attempt or endeavour to commit a rape, or any indecent assault. \* \*"

The question reserved for the consideration of the Court was:—

Does the "accusation" mentioned in sec. 405 include such an accusation as was made in this case before the justice of the peace?

TORONTO, February 20, 1900.

*David Robertson*, for the prisoners: Section 405 does not apply to an accusation made by means of laying an information; it applies to threats. It is one of the sections contained in Part XXIX. of the Code, under the title "Robbery and Extortion," and is aimed at acts of robbery and extortion and not at the laying of an information. The laying of an

information may be the basis of a conviction under sec. 152, which is in part X., "Misleading Justice." Laying an information is in itself a lawful act: *Allen v. Flood*, [1898] A.C. at p. 123; *Regina v. Jones* (1847), 2 C. & K. 398; *Rex v. Dunkley* (1825), 1 Mood. C.C. 90; *Regina v. Walton* (1863), 9 Cox C.C. 268; *The Queen v. Tomlinson*, [1895] 1 Q.B. 706, 710. The menace must be such as to affect the mind of a reasonable man: *Rex v. Newland* (1796), 2 Leach C.C. 721. The fact of the innocence or guilt of the present prosecutor of the charge laid against him is material: *Regina v. Richards* (1868), 11 Cox C.C. 43; and the Judge has found that Rumigh probably committed some offence.

*J. R. Cartwright*, Q.C., for the Crown: The provisions of the section should not be cut down: *The Queen v. Tomlinson*, [1895] 1 Q.B. 706. The word "accuse" should be given its ordinary meaning: Standard dictionary and Wharton's Law Lexicon, *sub verb*.

TORONTO, April 6, 1900.

BOYD, C.—

Section 405 of the Code provides for the punishment of one who, with intent to extort or gain anything for any person, accuses that person (whether the person accused is guilty or not) of any attempt to commit rape. To accuse, in ordinary parlance, in the form "to accuse (a person) of," means, to charge with the crime or fault of, etc. See Murray's Directory, *sub voce*. This may be done by laying an information against the person under sec. 558 of the Code. The person so charged is said to be the person *accused*. It is expressly laid down in the Am. & Eng. Encyc. of Law, 2nd ed., vol. 1, p. 481, *sub voce*, that the expression "to accuse" is used to denote the bringing of a charge against one before some Court or officer: see *People v. Braman* (1874), 30 Mich. 460. So in many English cases the expression "threatening to prosecute" is deemed equivalent to "threatening to accuse:" *Rex v. Abgood* (1826), 2

C. & P. 436. And, of course, "prosecuting" would be "accusing." See also *Rex v. Robinson* (1837), 2 M. & Rob. 14, where "to accuse" is held to mean not only to accuse by course of law, but also to charge before any third person. See also *Rex v. Gill* (1827), 2 Lewin C.C. 305. The word "accuse" in this connection should receive a liberal interpretation: see *per* Wills, J., in *The Queen v. Tomlinson*, [1895] 1 Q.B. at p. 710.

In response to the case reserved, it should be declared that the defendants are well convicted in the premises.

ROBERTSON, J., concurred.

MEREDITH, J.—

Anyone who lays "an information in writing and under oath," before a magistrate, against any person, obviously "accuses" that person of the offence charged against him in such information. He "accuses" in the strictest literal meaning of that word. Then, is there anything in the Criminal Code, or otherwise, to strip the word "accuses," in the section in question, of such meaning, to confine it to accusations made other than before a magistrate or some judicial tribunal?

Certainly the Code lends no aid to an answer in the affirmative; quite the contrary: it abounds in the use of some form of the word "accuse" in reference to a prosecution before a magistrate and before judicial tribunals, starting in the very section in which the laying of such an information is provided for, by referring to the person against whom the information is laid as "such accused person."

And the very section in question provides for the case of threatening to accuse, which of course must include a threat to accuse before a magistrate or some judicial tribunal: the words are "accuses or threatens to accuse:" and words so nearly connected, in the same section, can hardly have different meanings—the one excluding, the other including, the laying of the information.

No case was cited that lends any aid to Mr. Robertson's contention.

*Rex v. Robinson*, 2 M. & Rob. 14, certainly does not. There the contention for the prisoner was that the word "accuse," in a case of threatening to accuse, imported a charge before a magistrate or some judicial tribunal only; the ruling was, against that contention, that threatening to accuse meant threatening to charge before any third person; and so the case is frequently cited for the proposition that the words are not restricted to an accusation before a magistrate or a judicial tribunal, but include an accusation before any third person.

I have found an observation, reported to have been made by a learned Judge at the Central Criminal Court, which, at first sight, seems to favour Mr. Robertson's contention. In *Regina v. Cooper* (1849), 3 Cox C.C. 547 at p. 551, Cresswell, J., is reported to have said: "We have nothing to do with the charge at the police station, or that made before the magistrate. He could not make any charge there to extort money. We must look to what the charge was in the first instance."

But those words must, I feel sure, have had reference to the facts of that particular case only, not to the meaning of the word.

Ordinarily a peace officer ought to be one of the last persons to go to with the intention of making an accusation to extort money, for if peace officers do their duty with honesty and reasonable care, it ought to be a difficult if not quite an impossible thing to make effectual use of an actual criminal prosecution as a means of extortion. A criminal prosecution once begun ought to remove, very largely if not altogether, any hope of unlawful exaction of money or property by either the accusation of, or compounding, an offence.

But we have nothing to do with the facts of this case; we have merely to answer the question of law reserved, which, in substance, is:—Can there, under any circumstances, be an accusation, within the meaning of the word

"accuses" in sec. 405 of the Code, in the making of an accusation under and for the purposes provided for in sec. 558?

In my opinion that question must be answered in the affirmative.

*Conviction affirmed.*

**Note:** *Extortion by menaces—Cr. Code 404, 405.*

As to the analogous offence of demanding money or property with menaces, see *R. v. Collins*, 1 Can. Cr. Cas. 48 (N.B.), *R. v. Gibbons*, 1 Can. Cr. Cas. 340 (Man.), *R. v. Lyon*, 2 Can. Cr. Cas. 242 (Ont.), *R. v. Dixon*, 2 Can. Cr. Cas. 589 (N.S.), and *R. v. Dixon* (No. 2), 3 Can. Cr. Cas. 220 (N.S.).

[SUPERIOR COURT FOR THE DISTRICT OF  
MONTREAL.]

BEFORE MATHIEU, J.

## THE QUEEN V. BOUGIE.

*Habeas Corpus—Jurisdiction—Summary trials of criminal offences—Appeal—Keeping disorderly house—Nuisance—Cr. Code 195, 198, 743, 744, 782 a (1), 783, 784, 788, 808.*

1. Under Cap. 95 of the Revised Statutes of Lower Canada of 1861, which is still in force, the Superior Court has jurisdiction to issue a writ of habeas corpus, and decide upon it upon the petition of a person kept in jail in virtue of a conviction in a criminal matter.
2. The Court cannot on a writ of habeas corpus revise on its merits the decision of the Judge who has pronounced the conviction, nor adjudge on the culpability of the petitioner.
3. The recorder of the City of Montreal may, as a "magistrate" under Cr. Code 782, summarily try and condemn a person keeping a disorderly house in a manner constituting a nuisance, to a period of imprisonment of six months and to a fine of \$100, or, in default of payment of this fine, to six other months.
4. A conviction which declares that the convicted person is condemned to be imprisoned during the space of six months to be computed from the day of her arrival as a prisoner in the common jail of the district is sufficient, and the day from which the term of the sentence is to be computed is thereby sufficiently expressed.
5. A commitment stating that the prisoner shall be detained until the fine shall be paid to the keeper of the jail is regular although the conviction says that the fine is to be paid to the clerk of the Recorder's Court.
6. A person convicted, under the Summary Trial clauses, of having kept a disorderly house constituting a nuisance has no right of appeal other than by way of case reserved or case stated under Cr. Code 743 and 744.

MONTREAL, November 23, 1899.

MATHIEU, J.—

On the 13th of November instant, Désiré Bertrand, one of the constables of the City of Montreal, made a deposition before one of the recorders of Montreal, against Emma Bougie, wife of Charles Brazier, charging her with having kept for over three months, within the limits of police of the City of Montreal, No. . . . Lagauchetiere Street, a house

frequented at all hours of the day and night by men and women of depraved character . . . a disorderly house, a house of prostitution.

The same day a warrant was issued against the accused and also executed. On the 14th of November instant, the accused was brought before A. E. Poirier, Esquire, one of the recorders of Montreal, and pleaded not guilty. On the 15th she was found guilty and sentenced as follows: Six months, \$100, or six other months. On the same day a commitment was issued against the said Emma Bougie ordering that she be imprisoned for six months and should pay \$100 or be imprisoned during the space of six other months.

The said Emma Bougie is now detained in the common jail in virtue of this commitment. On the 17th instant, she presented to the Superior Court a petition asking to be released.

The same day, the 18th of November, I issued a writ of habeas corpus, and heard petitioner through her attorneys and the Honorable Attorney-General through his substitute and took the case under advisement.

The Attorney-General says there is no ground for the writ of habeas corpus in this instance, and that the accused was properly condemned by a proper tribunal.

In order to find out if the Court has jurisdiction to issue a writ of habeas corpus in the matter I have looked at many authorities.

[The learned judge then quotes Blackstone, 4th volume, page 224, and the Act passed under George III. in 1784, entitled: "An Act to ensure the security and the liberty of the subject in the Province of Quebec and to prevent the imprisonment outside of this province," based upon the Habeas Corpus Act of England, of 1677, 31 Charles II. ch. 2. The learned Judge also quotes chapter 95 of the Revised Statutes of Lower Canada, of 1861 "an Act concerning the writ of habeas corpus, the admission to bail and to protect the liberty of the subject," sections 20 and 25 of which were introduced in articles 1040 and 1052 of the Civil Code of Procedure of 1867.]

These articles 1040 and 1052 of the Code of 1867 have been repeated in article 1114 of the Code of Civil Procedure of 1897, but they apply only to civil cases.

According to section 1 of chap. 95 of the Revised Statutes of Lower Canada, every person deprived of her liberty on account of a criminal offense, has the right of asking for and obtaining from the Court of Queen's Bench or from the Superior Court a writ of habeas corpus. So the Superior Court has jurisdiction in this matter. Let us now see whether the reasons urged by the petitioner are well founded.

1. It is urged that petitioner has never committed a public nuisance by keeping a disorderly house, and moreover has never kept a disorderly house at all, nor done anything whatever that is reprehensible in the eyes of the law.

It is not for this Court to decide whether or not as a matter of fact the petitioner is guilty of the offence mentioned in the conviction.

2. That even supposing the complaint to be well founded and supported by proof, the recorder could not condemn the petitioner to six months imprisonment, and a fine of \$100 or six other months in default of payment of the said sum of \$100.

By article 782 of the Criminal Code the word "magistrate" signifies and includes every recorder in the Province of Quebec.

By paragraph (f) of article 783 it is provided that if a person is charged with keeping, or with being an inmate or habitual frequenter of any disorderly house, house of ill-fame or bawdy house the magistrate may hear and determine the case in a summary manner.

By article 784 when a person is charged with keeping or being an inmate of, or habitually frequenting a disorderly house, house of ill-fame or bawdy house, the jurisdiction of the magistrate is absolute, and does not depend upon the consent of the accused to be tried before the magistrate and it shall not be necessary to ask him whether he consents to such trial or not.

By article 788, in any case summarily tried under para-



graph (*f*) of 783, if the magistrate finds the charge proved, he may convict the person charged and commit him to the common gaol or other place of confinement there to be imprisoned with or without hard labor, for any term not exceeding six months or may condemn him to pay a fine not exceeding with the costs in the case \$100, or to both fine and imprisonment not exceeding the said sum and term; and such fine may be levied by warrant of distress under the hand and seal of the magistrate; or the person convicted may be condemned in addition, to any other imprisonment on the same conviction, to be committed to the common gaol or other place of confinement for a further term not exceeding six months, unless such fine is sooner paid.

The petitioner urged at the hearing that the Criminal Code creates two distinct offences with regard to disorderly houses and cited article 195 of part XIV which deals with nuisances and declares that a common bawdy house is a house, room, or set of rooms or place of any kind kept for purposes of prostitution, and article 198 which says that "every one is guilty of an indictable offense and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy house, common gaming house or common betting house, as hereinbefore defined.

The petitioner has also cited paragraph (*j*) of article 207 of part XV which treats of "vagrancy" and also article 208.

It is true that the Code seems to make a distinction between a common bawdy house constituting a public nuisance, and a disorderly house or house of ill-fame or house frequented by prostitutes, but the paragraph (*f*) of article 783 gives summary jurisdiction to the magistrate over persons accused of keeping, inhabiting or habitually frequenting a disorderly house, house of ill-fame or bawdy house, and article 784 gives him absolute jurisdiction over a person charged with habitually keeping a disorderly house, house of ill-fame or bawdy house, and article 788 authorizes him to condemn a person convicted of having kept a disorderly house, house of ill-fame or bawdy house.

It is true that article 195 under the title "Nuisances"

makes use of the expression "Common bawdy house" and that the paragraph (j) of article 207 under the heading "Vagrancy" uses the expression "disorderly house, bawdy house or house of ill-fame, or house for the report of prostitutes," and that the law seems to have made a distinction between "common bawdy houses" as nuisances, and disorderly houses or houses of ill-fame or houses frequented by prostitutes which are dealt with under the head of "Vagrancy."

Article 783 gives summary jurisdiction to the magistrate over persons keeping a disorderly house, house of ill-fame or bawdy house. This jurisdiction clearly refers to the keeping of common bawdy houses mentioned in article 195 which is a criminal and indictable offense. The title of part LV of the Code which comprises article 783 is "Summary Trial of Indictable Offences." These provisions are intended to give the recorder a summary jurisdiction which he would not otherwise possess. According to article 536, criminal offences may be prosecuted by indictment. The English title of part LV is "Summary Trial of Indictable Offences," translated into French by the words "*Instruction Sommaire des actes criminels*."

Article 207 creates offences subject to summary conviction which do not fall under part LV but under part LVIII which treats of "Summary Convictions."

If the object of article 783 is to give to the recorder a special jurisdiction, it was clearly that of determining the offence of keeping disorderly houses constituting a public nuisance. He already possessed jurisdiction, under articles 208, 839 and 840, over common bawdy houses included under "Vagrancy." The conviction seem to me to be quite in conformity with schedule 22 and article 807.

3. It is urged in the next place that the conviction is illegal because it is not stated in a precise manner from what date the imprisonment is to be reckoned.

The conviction recites that the petitioner is condemned to be imprisoned for the space of six months; counting from

the day of her arrival as a prisoner in the common jail of the district. This seems to me to be sufficient.

4. Next, it is urged that the commitment differs from the conviction in stating that on the 2nd day of November instant the petitioner was accused of keeping a disorderly house, whilst in the conviction the date is the 12th of November instant.

This allegation is unfounded as the commitment and conviction both conform with each other.

5. It is urged next that the commitment does not state how long the petitioner must be imprisoned in default of her paying the sum of \$100.

On the contrary the commitment is explicit on this point.

6. The next ground urged is that according to the conviction, petitioner is condemned to pay a fine of \$100 to the Clerk of the Recorder's Court whilst in the commitment it is stated that this sum must be paid to the gaoler.

This does not appear to us as well founded. The petitioner has no interest in invoking this variant. It seems to us that the payment of this sum to the gaoler is justified by law.

7. That the petitioner gave notice to the recorder that she intended to appeal from his judgment, and that the recorder illegally refused to liberate her under bail although requested.

Petitioner pretends to have the right to appeal from a conviction by the recorder in virtue of article 879 of the Criminal Code. This article forms part of part LVIII of the Code, which treats of "Summary Convictions," but article 808 declares that the provisions of part LVIII of the Criminal Code do not apply to any proceeding adopted in virtue of part LV which treats of the "Summary Trial of Indictable Offences," in virtue of which petitioner has been convicted.

As no right of appeal is granted by the provisions of part LV and as it is declared by article 808 that the provisions of part LVIII do not apply to proceedings adopted in virtue of

part LV, it follows that there is no appeal from the recorder's conviction.

The provisions of part LV treating of the "Summary Trial of Indictable Offences" have been extracted from chap. 176 of the Revised Statutes of Canada of 1886 intituled "Act concerning the Summary Administration of Criminal Justice." Section 34 of this statute declares that the provisions of the Act relating to criminal procedure and those of the Act relating to summary convictions shall not apply to any proceeding adopted in virtue of this Act.

This section makes it clear that the appeal allowed by the Summary Convictions Act, chap. 178 R.S.C. of 1886, do not apply at all to the Summary Trials Act chap. 176.

As there was no appeal under the Revised Statutes of Canada, there can be no appeal under the Criminal Code which has only made, on these points, a consolidation of the Acts relating to Criminal Trials and Criminal Convictions.

Article 782 of the Criminal Code has been amended by chap. 40 of 58-59 Vict. This amendment provides that the word "magistrate" shall signify, in all the provinces, whenever anyone is charged with any of the offences comprised in sections (a) to (f) of article 783, two justices of the peace sitting together, provided that whenever the accused shall be tried in virtue of this addition, he may appeal from a condemnation in the same manner as provided under "Summary Convictions" in part LVIII, and that articles 879 et seq. shall apply to such appeals. This amendment makes it quite clear that when a conviction takes place before the recorder, already mentioned in sub-section (1) of section (2) of article 782, no appeal lies. If petitioner pretends that she has the right of appeal under article 742 et seq. she ought to take the proceedings required by these articles, and if, in the course of proceedings the recorder refuses to do what the law obliges him to do, she will have her recourse by mandamus, but not by habeas corpus.

By paragraph 3 of section 4 of chap. 95 C.S.L.C. it is provided that the judge before whom a prisoner is brought, shall liberate and discharge him from imprisonment, taking

his recognizance to appear before the Court of Queen's Bench, unless it appears to the said judge that the prisoner is detained under an order or legal warrant of a court having jurisdiction in criminal matters, or in virtue of some warrant signed and sealed by one of the judges of the Court of Queen's Bench, or of the Superior Court, or by some justice of the peace. I find that petitioner has been imprisoned and is detained in custody in virtue of an order or legal warrant, of a court having jurisdiction in the accusation preferred against her, and that, in consequence, she cannot be discharged or liberated from imprisonment.

*Discharge refused.*

*Saint-Pierre, Pélissier & Wilson*, attorneys for petitioner.  
*O. Desmarais, Q.C.*, and *J. P. Cooke, Q.C.*, attorneys for the Crown.

[COUNTY JUDGES' CRIMINAL COURT, COUNTY OF  
YORK, ONTARIO.]BEFORE HIS HONOR JOSEPH E. McDougall, SENIOR COUNTY  
JUDGE.

## THE QUEEN v. SAUNDERS.

*Common gaming house—Room kept for gain—Proof of gain—  
Voluntary allowances to proprietor out of stakes for  
refreshments served—Failure to prove allowance excessive  
—Cr. Code 196 (a), 198.*

- 1.—A room resorted to for the purpose of playing the game of poker is not shewn to be kept "for gain" under Cr. Code 196 (a) by the mere proof that the proprietor who participated in the game on equal terms with the others, was allowed by the consent of the players, and not as a matter of right nor as a condition on which the playing took place, to take small sums from the stakes on several occasions by way of reimbursement for refreshments provided by him to the players, where such sums are not shewn to exceed the cost or value of the refreshments.

DECIDED: April 11, 1900.

The defendant was committed for trial by the Police Magistrate of the City of Toronto on 2nd January, 1900, on the charge of unlawfully keeping a common gaming house, and the trial was held on 14th February, 1900, before McDougall, Co. J., without a jury.

*H. H. Dewart, Q.C., for the Crown.*

*E. E. A. Du Vernet, for the defendant.*

TORONTO, April 11, 1900.

McDOUGALL, Co. J.—

The defendant is charged with keeping a disorderly house, to wit, a common gaming house, under section 196 of the Code.

The facts established by the Crown shew that the defendant, who keeps a large billiard room on a Yonge street and

who resided in rooms in the same building above his billiard room, was in the habit of inviting his friends to his private apartment once or twice a week, and engaged with them in a game of poker for money stakes. On the night in question the police raided the apartment and found the defendant and nine other parties in the room. On the table were cards and money, and it was apparent, and, indeed, not denied, that the party, including the defendant, just before the police entered the apartment had been playing a game of cards for money stakes. Several of the persons found by the police were put in the box by the Crown and told their story of what had been transpiring. McIntosh, a billiard marker in the service of the defendant, said that the defendant and six or seven of his friends on the night in question were having a quiet game of cards—poker; that the game was poker and the stakes were limited, which the witness described as 25c. ante and 50c. limit. The defendant put up his own stake the same as the others, and took his chance in the game. No charge was made to any of the persons found in the room for their admission thereto, and the chances of the game were alike favorable to all the players. Refreshments were provided by the defendant during the evening. Sutcliffe, one of the players, stated that the parties had agreed that the defendant might take out of what was called “the pot” sometimes 5c. and sometimes 10c. towards recouping himself for the cost of the refreshments provided by him. These deductions were not made from every “pot,” but out of most of them. The defendant, as one of the players, put into the “pot” in the first instance the same amount as the other players. Sutcliffe says the amount taken out for refreshments was small. He said he went there himself because he liked a game of poker sometimes; that only those whom he understood to be friends or acquaintances of the defendant were present. It was in the defendant’s private room used by him and his family that the cards were played; so far as he could see, just the same as a game in a private person’s house; the game was perfectly fair; that there was no bank kept,

no charge for admission, and the defendant was always one of the players.

The police say that the defendant had a reputation of keeping a gambling house ; that they had raded on a former occasion, but had not succeeded in catching those in the room actually engaged in a game. On the night in question they were actually so engaged as they entered the room, some of them being seated at the table, and money and cards were lying on the table. The police took possession of some \$6.70.

The clause in the statute upon which the Crown case depends (Cr. Code 196*a*) reads as follows :—

“ A common gaming house is—

(*a*) A house, room, or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance, or at any mixed game of chance and skill.”

The defence admit the card playing for money in the defendant's house, but say it was not for gain, and that it was no more contrary to the statute than any game of cards for money in any gentleman's private house.

The Crown has to depend upon the defendant's friends called as Crown witnesses to establish the nature of the game played, and the conditions and circumstances under which it was being played, and no evidence of any gain to the defendant is given beyond the fact that the defendant, with the consent of the players—not as a matter of right nor as a condition of anyone being admitted to the game—was allowed from time to time to take 5*c.* or 10*c.* from the stakes on the table to pay the cost of what the players ate and drank. These refreshments were sworn to be beer and whiskey, and sandwiches, cold meat, and bread and butter. The defendant himself joined in the game as one of the players, and the other players did not think that it was fair that the defendant should pay out of his own pocket for what the others ate and drank.

The English statute 17 and 18 Vict., cap. 38, sec. 4, relating to gaming differs materially from our section of the Code 196 (*a*). The section in the English Act renders liable to



summary conviction and a fine "any person being the owner or occupier or having the use of any house, room, or place, who shall use the same for the purpose of unlawful gaming being carried on therein," also "a person as owner or occupier knowingly allowing the room to be used by others for that purpose," also "every person having the care or management or assisting in conducting the business of any house, etc., etc."

Our Act, on the other hand, only constitutes a house or room a common gaming house *where it is kept for gain*. I take it, therefore, that the Crown, in order to obtain a conviction, must shew by satisfactory evidence that the person charged is deriving some gain or profit from keeping the room and allowing games of chance to be played therein. In the present case the evidence does not establish how much this 5c. and 10c. contribution of the players would amount to in an evening. There is nothing to indicate what was the cost or approximate cost of the refreshments provided by the defendant. If it had appeared that the "rake off" (as one of the witnesses expresses it) amounted to \$8 or \$10 and the refreshments only cost \$3 or \$4, it might well be contended the defendant was making a profit or gain of about \$5 an evening for the use of his room. Sutcliffe, the only witness who speaks on the point, says the money realized from 5c. and 10c. contributions only amounted to a very small sum. He further says that there were some "pots" from which no deduction was made whatever. Whatever might be the conjecture as to whether the defendant may not have realized a tidy room rent from a surplus of the moneys so supplied him for refreshments, the evidence does not supply the information.

In the absence of more definite evidence upon this point, I do not think it would be proper to convict.

*Defendant acquitted.*

## [COURT OF QUEEN'S BENCH, QUEBEC.]

DISTRICT OF MONTREAL.

BEFORE WURTELE, J.

## THE QUEEN v. WEIR (No. 5.)

*Indictment—Defect in substance—Motion to quash—Amendment—Forgery—Uttering document signed by prosecution without authority—Allegation of knowledge—Cr. Code 431, 611, 629, 723.*

1. Each count of an indictment must contain a statement of all the essential ingredients which constitute the offence charged.
2. In charging the offence of uttering a forged instrument the indictment must aver that the defendants made use of or uttered the instrument knowing it to have been forged.
3. A count of an indictment charging the defendant with having, with intent to defraud, unlawfully made use of and uttered a promissory note, alleged to have been made and signed by one of the defendants by procuration without lawful authority or excuse and with intent to defraud, is defective if it does not also allege that the defendants knew it to have been so made and signed.
4. Such a defect is one of substance and cannot be amended under Cr. Code, sec. 629.

ARGUED : March 13, 1900.

DECIDED : March 27, 1900.

Motion to quash the second count of the indictment which was as follows :

“ The jurors of our lady the Queen upon their oath present that :

“ Heretofore, to wit, on the twenty-seventh day of May, in the year of Our Lord one thousand eight hundred and ninety-nine, William Weir was president, Edward Lichtenhein was vice-president, Godfrey Weir and Frederick W. Smith, were directors of a certain incorporated bank, to wit, La Banque Ville Marie; and that the said Wm. Weir, Edward Lichtenhein, Godfrey Weir and Frederick W. Smith did on the day and year aforesaid, at the City and District of Montreal, with intent to defraud, and without lawful authority and excuse,

make and execute and sign in the name of the Estate F. X. Beaudry, a certain promissory note in favor of the said "La Banque Ville Marie," for the sum of four thousand two hundred and sixty-six dollars and twenty-one cents (\$4,266.21) by procuration of the said William Weir.

"And the said jurors further present that the said William Weir, Edward Lichtenhein, Godfrey Weir and Frederick W. Smith, afterwards, to wit, on the twenty-seventh day of May, in the year aforesaid, at the said City and District of Montreal, did, with intent to defraud, unlawfully make use of and utter the said promissory note for the sum of four thousand two hundred and sixty-six dollars and twenty-one cents (\$4,266.21), so signed by procuration by the said William Weir."

Section 431 of the Criminal Code, provides that :

"Every one is guilty of an indictable offence who, with intent to defraud and without lawful authority or excuse, makes or executes, draws, signs, accepts or endorses, in the name or on the account of another person, by procuration or otherwise, any document, or makes use of or utters any such document knowing it to be so made, executed, signed, accepted or endorsed, and is liable to the same punishment as if he had forged such document."

MONTREAL, March 13, 1900.

*Donald Macmaster, Q.C.*, for the defendants : There is a radical defect in the second count of the indictment, and we ask for leave either to withdraw the plea of "not guilty," and to move to quash that count, or for leave to argue the point by permission of the court, without withdrawing the plea.

[The court intimated that it would hear the argument without withdrawing the plea.]

Article 431 of the Criminal Code created two distinct offences, firstly, the making of a document in another person's name, either personally or through the instrumentality of an agent, with intent to defraud, and without lawful authority ; and secondly, the using or putting in circulation of such a document—"knowing it to be so made" that is made, "with

intent to defraud and without lawful authority." Any one committing either of these offences is liable to the same punishment as if he had forged such document. The first offence, then, is practically for forgery. The second is for making use of the forged document—two perfectly separate and distinct offences.

The indictment consists of two counts and purports to charge the two distinct offences—the making, and the using or uttering. The second count should be quashed upon the ground that it does not disclose an indictable offence. Article 611 of the Criminal Code provides that—"every count of an indictment shall contain, and shall be sufficient if it contains, in substance, a statement that the accused has committed some indictable offence therein specified." Sub-section 6 of the same article declares that "every count shall in general apply only to a single transaction." These provisions were absolute. The second count professed to deal with a single transaction, viz., the using or uttering of the note on a particular day. But, it did not go far enough. It omitted to say that this was done by the accused, "knowing that the note was made with intent to defraud and without lawful authority or excuse." These were the words essential to constitute the offence. It was no offence for them to use and utter a note, but it was an offence for them to use and utter a note that they knew was a forgery, and was made with intent to defraud. The guilty knowledge was essential to be proved on the second count, but it could not be proved unless it was alleged, and without it the count was defective in substance. Section 629 of the Criminal Code, by which an amendment may be made by the court for defects, has always been restricted to formal defects; a defect in substance could not be cured. *The Queen v. Cameron*, 2 Can. Crim. Cas. 173, decided by the Hon. Mr. Justice Wurtelle, *The Queen v. Bulmer*, 5 Legal News, 287.

*Cooke, Q.C.*, for the Crown : If the second count be taken in connection with the first count it is plain that the accused must have had knowledge of the forgery, because it was

stated in the first count that they made the note with intent to defraud and without lawful authority or excuse. If the count be defective the court has power, under section 629 of the Criminal Code to amend the defect. The count is not defective. A guilty knowledge is sufficiently alleged under the words "with intent to defraud" and "unlawfully" contained in the second count.

*Macmaster*, Q.C., in reply.

MONTREAL, March 27, 1900.

WÜRTELE, J.—

The indictment is founded on article 431 of the Criminal Code which enacts that every one is guilty of an indictable offence who, with intent to defraud and without lawful authority or excuse, makes and signs in the name of another person by procuration any document (which word includes a promissory note) or who makes use of or utters any such document knowing it to have been so made and signed. This article creates two substantive and distinct crimes; the one is the making and signing of a document by procuration without lawful authority or excuse and with intent to defraud, and the other is the making use of and the uttering of such a document knowing it to have been so made and signed.

The making and signing of the promissory note mentioned in the indictment constitute the offence of constructive forgery. In prosecutions for forgery it is usual to charge the accused in a second count of the indictment with uttering the forged instrument, and such a count is inserted lest the prosecution fail to prove the actual forgery; but the forging and the uttering may each be the subject of a separate indictment as each of these acts is a distinct offence which may be committed by the same person or one person may commit the forgery and another may utter the forged instrument.

Under the provisions of article 626 of the Criminal Code each count in an indictment may be treated as a separate indictment, and the accused may be tried on any one or more of the counts contained in an indictment, separately. The

consequence of this is that each count must contain a complete allegation of the offence which is charged in it against the accused.

William Weir and Godfrey Weir, two of the defendants have moved, by leave of the court, that the second count of the indictment be quashed because it does not contain in substance a statement showing that the accused have committed some indictable offence therein specified. Their objection is that one of the essentials which constitute the crime of uttering a forged instrument is the guilty knowledge of the utterer that the instrument made use of and uttered had been forged, or as in the present case, that it had been made and signed by procuration without lawful authority or excuse and with intent to defraud.

Now every count of an indictment must contain a statement of all the essential ingredients which together constitute the offence with which an accused person is charged, and any omission of any such essential ingredient renders an indictment or a count ineffectual, as no verdict and judgment can be founded on it and consequently such omission renders the indictment or count null and void. A formal defect or an imperfect averment in an indictment or in a count may be corrected by the court when an objection is raised, but matters of substance cannot be amended, and essential allegations which have been entirely omitted cannot be added by the court. In the crime of uttering a forged instrument, the knowledge by the utterer that the instrument uttered was forged and had been made with an intent to defraud, is an essential element, and without such guilty knowledge the making use of a false instrument is no crime. In the present case, the second count does not allege that the defendants made use of or uttered the promissory note made and signed in the name of the Estate F. X. Beaudry knowing it to have been made and signed by procuration without lawful authority or excuse and with intent to defraud. One of the vital elements of the offence has been omitted and the count is

therefore ineffectual and null and void, and it consequently must be quashed.

It was stated at the argument on the motion to quash that the second count had been added to allow proof to be made of the intent to defraud. The first count however charges the defendants with having made and signed the promissory note described in it, with intent to defraud; and as it is not necessary upon the trial of an indictment for forging an instrument to prove an intent to defraud any particular person, but it is sufficient to prove that the accused did the act charged with an intent to defraud, the quashing of the count charging the uttering as a substantive and distinct offence will not prevent the prosecution from proving how the false promissory note was used but this will be done only to prove an intent to defraud on the part of those who are accused of the forgery. The allegation of a bare intention to defraud is a sufficient statement in such an indictment, and when the fraud has been carried out it need not appear on the face of the indictment in what manner and by what means the fraud was consummated. Such consummation is no ingredient of the specific crime of forgery, whether such forging be real or constructive, and it is mere matter of evidence, and the manner and the means by which the fraud was effected or was intended to be effected can be proved under the allegation of the intent to defraud.

The second count is quashed and the indictment will remain and be complete with the first count.

*Motion allowed.*

*Odilon Desmarais, Q.C., and J. P. Cooke, Q.C., Crown prosecutors.*

*J. N. Greenshields, Q.C., D. Macmaster, Q.C., and Charles Archer, for the defendants.*

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., WEATHERBE, RITCHIE, AND  
TOWNSHEND, JJ., AND GRAHAM, E.J.

## THE QUEEN v. DOHERTY.

*Magistrate's summons—Defect in service—Service by unauthorised person—Appearance of defendant by counsel—Waiver—Objection by counsel—Counsel's withdrawal—Excessive penalty in default of distress—Irregular "costs of commitment"—Surplusage—Canada Temperance Act, ss. 117, 118—Cr. Code, 855, 857, 872.*

1. The defendant's appearance by counsel upon the return of a magistrate's summons is a waiver of any irregularity in respect of the service not having been effected by a peace officer, although counsel objects on that ground to the hearing being proceeded with.
2. The absence of defendant's counsel from the adjourned sittings at which the magistrate pronounced his judgment, the evidence having been closed at the former sittings at which counsel appeared, does not affect the power of the magistrate to convict, notwithstanding any such irregularity in the service.
3. Where in a summary conviction it was adjudged that in default of payment of the fine and of the amount taxed to the prosecutor for his costs, and in default of sufficient distress therefor, the defendant be imprisoned for a term specified, unless such fine and costs, etc., and the *costs of the commitment*, were sooner paid, the words "*costs of the commitment*" irregularly included therein may be treated as surplusage, and their inclusion will not invalidate the conviction, if, in fact, there are no costs of commitment apart from the costs taxed and allowed in the conviction and warrant of commitment.

ARGUED : April 6, 1899.

DECIDED : May 15, 1899.

Appeal from the judgment of Meagher, J.

The defendant was served with a summons on the 19th of January last requiring him to appear before the stipendiary magistrate of the town of Pictou, at eleven o'clock in the forenoon of the 21st of January, to answer a charge of unlawfully keeping intoxicating liquor for sale, contrary to the provisions of the second part of the Canada Temperance Act. The defendant did not appear personally, but sent his



solicitor, who attended at the hearing, appeared and objected to the hearing being proceeded with on the ground that the party who served the summons was not a constable or other peace officer of Pictou county.

The defendant's solicitor cross-examined the constable and renewed his objection. Another witness was called and examined and proved the offence charged. The stipendiary then adjourned to January 27th, at 2.30 p.m., for the purpose of preparing his judgment, and, at the time to which he had adjourned, he delivered judgment and convicted the defendant, and adjudged that he pay the sum of \$50, and also that he pay the informant his costs amounting to \$4.10, such sums if not paid forthwith to be levied by distress of the goods and chattels of defendant, and, in default of distress, that defendant be imprisoned for the space of 60 days, unless such sums and the costs and charges of said distress and of the commitment, and of conveying defendant to jail, were sooner paid.

Three grounds were relied on in the motion for a certiorari :

1. That the party who served the summons was not a constable ;
2. That the adjournment was illegal ; and
3. That the conviction improperly awarded costs of commitment as well as costs of conveying to jail.

MEAGHER, J.—

There is no proof to show that Murray, who served the summons, was not a constable. The affidavits do not show it, and if I regard the evidence, a copy of which was produced, I should say there was abundant proof to show he was a constable. At any rate, that question cannot be enquired into upon the present motion, nor upon the trial. *Casey v. Smith*, 26 N.S.R. 177 ; *The Queen v. James Gibson*, 29 N.S.R. 4 [3 Can. Cr. Cas. 451] ; and *O'Neill v. Attorney-General*, 1 Can. Cr. Cas. 303 ; 26 Can. S.C.R. 122. The constable was not a party to the proceeding, and, upon such

an enquiry as this, his right or title to the office cannot be enquired into. The appearance, however, cured any defect there may have been in the service. I do not say there was any. *Blois v. Richards*, 1 R. & G., 203; *Rex v. Aiken*, 3 Burr. 786; *Rex v. Johnson*, 1 Strange 261; *Reg. v. Shaw*, 10 Cox C.C. 713; *Reg. v. Clarke*, 19 Ont. R. 601, and *Reg. v. Roe*, 16 Ont. R. 3.

In *Harvey v. Hall*, 23 L.T.N.S. 391, it was held that appearing by counsel to object to a notice of motion, on the ground of the want of personal service, is a waiver of the objection itself. *Levy v. Duncombe*, 1 C. M. & R. 739; *Storness v. Lake*, 40 U.C.Q.B. 327 and 328; and *Reg. v. Bennett*, 3 Ont. R. 64.

In *Regina v. Justices of Carrick on Suir*, 16 Cox C.C. 571, Morris, C.J., said :—‘ Having appeared to the summons, he was exactly in the same position as if he had been most perfectly, legally and technically served without the slightest irregularity.’

In *Reg. v. Menary*, 19 Ont. R. 691, Armour, C.J., said : ‘ The mode adopted to bring the defendant before the justices is not a ground for quashing the conviction.’

If an adjournment had been asked and wrongfully refused, and it was clear that defendant had not been afforded sufficient time to prepare his defence, a different question would present itself. But it was not raised here nor before the stipendiary.

With respect to the adjournment, it is significant that both affidavits are entirely silent as to whether McDonald, the solicitor, was present when the adjournment was made, or had due notice of the terms of adjournment. I would be justified in assuming he had not left court when the adjournment was made, or, at all events, knew its terms. It is not necessary to adopt that conclusion. The case was closed the first day. No further evidence was taken, and all that was done on the second occasion was to pronounce judgment convicting the defendant.

In *Regina v. Justices of Carrick on Suir*, 16 Cox C.C. 571, Morris, C.J., after using the language already quoted,

added: 'But he chose to go away, and when persons choose to take a certain course, they must take the benefits with the losses.' The defendant was, therefore, held to be properly convicted notwithstanding his absence.

In this instance the appearance cured any defect in the service, and if the defendant's solicitor thought proper, after appearing, to leave the court, under the circumstances shown to exist here, that could not affect the power of the stipendiary to adjourn. The right and power of the stipendiary to adjourn cannot be questioned, and if the defendant was not present when the judgment convicting him was pronounced, it was his own fault, and that of his solicitor, and he ought not to be permitted to take advantage of his absence, which was wilful I have no doubt.

*The Queen v. The Cinque Ports* (1886), 17 Q.B.D. 191, is a strong case to show the power of the justice to convict in the absence of the defendant. The statute applicable to that case provided that a justice might summon the parent of a child, after notice to procure its being vaccinated, to appear with the child before him, and 'upon the appearance' the justice was empowered to make an order, etc. The parent did not appear, and it was held that the order could be made, notwithstanding the terms of the statute, and notwithstanding the non-appearance of the father and child.

With respect to the third ground, the presence of the words 'costs of commitment,' it may be that the use of these words was irregular, but they appear to me to be harmless. There are no costs of commitment apart from the costs taxed and allowed in the conviction and warrant of commitment. The costs of conveying to jail are distinct from the costs of commitment, if any. Mr. Ritchie was unable to suggest any costs that could possibly be claimed, except, as he put it, 'probably the justice's fees for warrant of commitment.' If he is entitled to such a fee, no wrong or injury will be done to defendant; if he is not entitled to it, I assume it will not be demanded.

But, assuming that these words are improperly in the

conviction, they are mere surplusage, and if the certiorari issued and the conviction was brought up, I should, upon the matter coming up before me, amend the conviction at once by striking them out. It would be an idle proceeding to issue a certiorari to bring the conviction up for the mere purpose of striking out those words.

In *Reg. v. Manchester Railway Company* (1838), 8 A. & E. 413, it was held that 'the granting a certiorari is matter of discretion, though there are fatal defects in the face of the proceedings which it is sought to bring up.'

*Reg. v. Menary*, 19 Ont. R. 691, is an authority to show that the imposition of costs of this character is not regarded as part of the punishment or penalty. Armour, C.J., in giving the judgment of the court, said :—

'But if they (the justices) had no such power (referring to the costs and charges of conveying the defendant to jail), I am of opinion that the conviction was amendable, as and when it was amended, for they were not amending their adjudication of punishment, which was the imposition of a fine, and, on default of payment, of the imprisonment, but merely the proceeding whereby the payment of the fine was, according to their view of the law, to be enforced.'

*The Queen v. Gavin* (1897), 1 Can. Cr. Cas. 59; 30 N.S.R. 162, was relied on, but it does not conflict with the case just referred to, nor do I think I am acting in the slightest degree contrary to it in refusing the present motion.

*Regina v. Cridland* (1857), 7 E. & B. 53, was relied on in the present instance. It is enough to say that the statute governing here is a widely different one from that which applied in that case. Moreover, the conviction in that case directed each one of the defendants to be imprisoned until the costs and expenses of conveying all four of them to jail should be paid, thereby making each defendant liable for the default of the others.

The motion will be refused. I think that even if an attempt had been made to enforce a warrant of commitment in respect to the costs of commitment, and the fine and the other costs, the defendant's remedy would have been to

tender the amount due. Vide *Skingley v. Surridge*, 11 M. & W. 516; also *Reg. v. Sanderson*, 12 Ont. App. 188.

HALIFAX, April 6, 1899.

*W. B. A. Ritchie*, Q.C., in support of appeal: Costs of commitment should not have been inserted in the conviction. There is no provision either in the Canada Temperance Act or in the Criminal Code for costs of commitment. Statutes of Canada, 1888, p. 256. Costs of commitment are provided for in the tariff of fees, but it does not follow that they are payable by the defendant. If this is authorized under the Code, it must be under sec. 872, which contains no provision for costs of commitment. Even supposing the conviction is amendable, it cannot be amended until it has been brought up by certiorari. Where a conviction which is illegal puts some unauthorized obligation on a party, and there is no remedy except by certiorari, there is no discretion to withhold the writ. *Regina v. Justices of Surrey*, L.R. 5 Q.B. 466; *Ex parte Conway*, 31 N.B.R. 407. Sec. 118 (Can. Temp. Act) provides that the conviction can be amended, but only upon an application to quash the conviction. Secs. 117 and 118 do not apply where the penalty imposed is greater than the statute authorizes. The amount which defendant must pay in order to get out of jail is a part of the penalty. *The Queen v. Gavin*, 1 Can. Cr. Cas. 59, 30 N.S.R. 162; *Regina v. Cridland*, 7 El. & Bl. 53. The part of the conviction which is irregular is not severable. Paley on Convictions, 172 and 189; *Clark v. Woods*, 2 Exch. 395.

HALIFAX, May 15, 1899.

MCDONALD, C.J.—

I am of opinion that the appeal in this case should be dismissed with costs, for the reasons given in the judgment of the learned judge appealed from.

RITCHIE, J.—

I agree with the judge below. The appeal should be dismissed.

TOWNSHEND, J.—

I have had some difficulty, but on the whole I think the appeal should be dismissed on the grounds stated by the judge below in his opinion.

WEATHERBE, J. (dissenting)—

Though the proper notice was given, no one appeared to oppose this motion for certiorari.

The conviction complained of awards a penalty of fifty dollars, with four dollars and ten cents costs, after which these words follow :—

“And in default of sufficient distress in that behalf, I adjudge the said Nathaniel Doherty to be imprisoned in the common jail, etc., . . . and there to be kept for the space of sixty days, unless the said sums and the costs and charges of said distress, and of the commitment, and of conveying the said Nathaniel Doherty to the common jail, be sooner paid.”

No costs of commitment could be recovered according to law, and yet the warrant is so worded that the jailer is not permitted to discharge the prisoner without the payment of such costs. In other words, the prisoner is to be kept for the space of sixty days unless costs of distress and commitment are paid in addition to costs for conveying the prisoner to jail. There are no sums for either of these three things mentioned—two of them are legal and one illegal.

With respect to the admittedly illegal claim which may be set up for costs of commitment, the learned judge appealed from says of the justice :—

“If he is entitled to such a fee, no wrong or injury will be done to defendant. If he is not entitled to it, I assume it will not be demanded.”

This seems to me to be submitting a question of law difficult to answer, for the solution of the jailer. We cannot assume that a fee will not be demanded, since the justice has, by the language of the warrant, specifically denied the right of release of the prisoner until payment.

Again, the learned judge says that "if the words are improperly in the conviction they are mere surplusage." But these words are not, like those in the case cited in the decision appealed from, surplusage. According to my view of the law relating to convictions, in no case where illegal and unauthorized fees are adjudged to be collected under warrant can the words be said to be surplusage, as in the case of the wholly immaterial words referred to.

Then it is said that, in case the words are improperly in the conviction, the conviction, on a motion to quash the same, would be amended. That, I think, is no reason for refusing the certiorari in the present instance, and I think there is no authority whatever for refusal on such a ground. Even if amendable, I think it will depend entirely upon circumstances whether the conviction will be amended. To assert beforehand that it will be amended, is to adjudge behind the back of the parties.

*The Queen v. Chantrell*, L.R. 10 Q.B. 587, was a case where the justices stated a case in Quarter Sessions for the opinion of the court. A statute forbidding the removal of proceedings by certiorari (12 and 13 Vict., sec. 6) was held to preclude the issue of certiorari to bring up such case. That is a different case from the present. Here the application is to bring up a conviction where the justice has made an illegal conviction which he had no authority to make.

It is said that certiorari will not lie by reason of sec. 117 R.S. Can., cap. 106, which provides that no process under the Acts referred to shall be held invalid if, among other things, no greater penalty is imposed than is authorized by such Act.

In 17 Ont. Rep. 715, *Regina v. Flory* is supposed to show that the word penalty in this statute would not comprise the imposition of these costs. There the statute draws a

distinction between penalty and costs, and while I agree with the decision in that case under the Ontario statute, it does not appear to me to afford any assistance unless to show that here the distinction relied on should not be drawn.

*Regina v. Menary*, 19 Ont. R. 691, was a case also under the Ontario statute. A recital in the conviction of an admission of defendant that he had no goods was held to be, as it well might, surplusage. In this case, after the filing of a conviction, an amended conviction was drawn up and filed by the justice, which amendment was held to be within the power of the justice.

In this case, I am of opinion the appeal should be allowed.

GRAHAM, E.J. (dissenting)—

In this case the magistrate has required the defendant to pay the costs of commitment, and there is no power to do that. It cannot be the law that if an excessive money penalty or excessive costs are imposed, the defendant must ascertain the proper amount and pay that, and is to have no other remedy as to the excess until that is done. It has been decided that in a case in which an excessive term of imprisonment is imposed, the conviction cannot be amended.

The magistrate, in imposing the term of imprisonment in the event of non-payment, fixes the term to correspond with the amount to be paid, and, of course, according to the hypothesis he is wrong in both. And, suppose the defendant has no property or money, How does he obtain his remedy in that case? The very fact that under the statute the conviction cannot be amended if the penalty is excessive, shows it cannot be the law.

It is suggested that the writ of certiorari ought not to go because the conviction would be amended if it was brought up. Not so, if the costs comprise a part of the penalty. And if the term is to correspond with the amount to be paid, it is an argument to show that in this context the expression "penalty" does include the costs. Whether this is so or



not, as no one appeared to oppose the writ or to suggest that an amendment would be asked for when the conviction does come up, it seems premature to say in advance that it will be amended if it does come up. The appeal ought to be allowed. No costs, as there was no appearance.

*Appeal dismissed with costs.*

(Per McDONALD, C.J., RITCHIE and TOWNSHEND, JJ.; affirming MEAGHER, J.)

**Note:** *Waiver in criminal matters.*

See Note on this subject in Vol. I. Can. Cr. Cas. pp. 93-95, also *R. v. Corby*, 2 Can. Cr. Cas. 457, and a Note *ibid.* p. 465.

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[COURT OF QUEEN'S BENCH, MANITOBA].

BEFORE BAIN, J.

**THE QUEEN v. GREAT WEST LAUNDRY CO.**

*Manslaughter—Indictment of corporation for—Demurrer—Negligent maintenance of dangerous machinery—Unprotected shafting—Omission of legal duty—Cr. Code 3 (t), 213, 220, 639.*

1. A corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others.
2. Cr. Code secs. 213 and 220, as to want of care in the maintenance of dangerous things, do not extend the criminal responsibility of corporations beyond what it was at common law.
3. There is no power under Code section 639 or otherwise to impose a fine or any other punishment, in lieu of imprisonment, for the offence of manslaughter, and there is consequently no judgment or sentence applicable to a conviction of a corporation for that offence.

ARGUED: March 19, 1900.

DECIDED: April 9, 1900.

Demurrer to an indictment. The first count alleged that The Great West Laundry Company, Limited, was a

corporation, incorporated under the provisions of The Manitoba Joint Stock Companies Act; that on the 31st of January, 1900, said company was carrying on a laundry business by means of a steam engine, shafting and other machinery maintained by it, with the assistance of persons employed by the company, and it became and was the duty of the company to take reasonable precautions against and to use reasonable care to avoid danger to the lives of said employees from said shafting and machinery coming in contact with said employees while the same was in rapid motion, yet the said company on the date last aforesaid and for a long time prior thereto unlawfully and negligently omitted to take such reasonable precautions and to use such reasonable care; but on the contrary, had erected and was maintaining a rapidly revolving shaft at a distance of about sixteen inches above the floor and two or three feet from the side wall of the room where a number of female employees were working, which shaft was then, and had for a long time been entirely uncovered and unprotected, in consequence whereof one Gudrun Johansson, a female in the employment of said company, on the date aforesaid, while doing her usual work as such employee, and in the act of stepping over said shaft, was caught therein by her skirts, and thrown with violence to the floor and so wounded and injured that she died on the same day.

The second count alleged that The Great West Laundry Company, Limited, a corporation duly incorporated, on the 31st of January, 1900, unlawfully did kill and slay one Gudrun Johansson.

The accused corporation demurred to the first count on the ground that it did not charge any indictable offence, and to the second count on the ground that an indictment for manslaughter would not lie against a corporation.

In support of the demurrer it was argued that a corporation, as such, is not in law capable of committing manslaughter, and that even if it were convicted of such an

offence the law has made no provision for punishing it therefor. •

WINNIPEG, Manitoba, March 19, 1900.

*H. M. Howell, Q.C.*, for the defendants: The first count does not set forth any crime. A corporation cannot be found guilty of manslaughter, for there is no punishment applicable to a corporation. Section 958 of the Criminal Code 1892, does not enable a Court to punish a corporation for manslaughter, because as to this crime there is no option of fine. That section was taken from R.S.C., c. 181, s. 31, s-s. 2, which applied only to misdemeanors. In England there is not this special provision, but in most legislation relating to punishment of misdemeanors there is an option to fine. In England there may be a fine for manslaughter. Archibald's Criminal Pleading, 735. Section 230 of the Code defines manslaughter, and section 236 states the punishment; there is no discretion to inflict a fine under section 958. Even if a corporation could be indicted for manslaughter there would be a trial without result. The Code does not apply to corporations so far as manslaughter is concerned. Section 3, sub-section (t) defines "person." "Everyone," in section 236, does not apply to corporations. The Crown cannot indict for any act for which the accused cannot be punished: Amer. and Eng. Ency. of Law, vol. 7, p. 842; *Commonwealth v. Pulaski*, 92 Ky. 197, 17 S.W. Rep. 442. But, aside from the question of punishment, a corporation cannot be indicted for offences such as manslaughter, involving personal violence. It can be indicted only for a breach of its statutory duties, and for a breach of its duty to the public, as for nuisance and other similar offences to the general public. Brice on Ultra Vires, cap. 13; *Pharmaceutical Society v. London Supply Association*, 5 A.C. 869; *Reg. v. Birmingham Ry. Co.*, 3 Q.B. 231. A corporation cannot sue for libel affecting personal reputation; *Mayor of Manchester v. Williams*, [1891] 1 Q.B. 94; but may sue for a libel affecting property; *Met. Omnibus Co. v. Hawkins*,

4 H. & N. 90. The old law was that a corporation could not be held criminally liable because it could have no criminal intent, and at the most now it can only be punished for what might be called passive or permissive negligence. As to whether a corporation can be held guilty of express malice, see *Nevill v. Fine Arts Insurance Co.*, [1897] A.C. 68. Canadian cases are *R. v. Chapman*, 1 Ont. R. 582; *R. v. Eaton*, 2 Can. Crim. Cas. 252; *R. v. Toronto Ry. Co.*, 2 Can. Crim. Cas. 471. At first corporations were held liable only for non-feasance, but now a corporation may be indicted for a misfeasance: *Reg. v. Great North of England Ry. Co.*, 9 Q.B. 315; *Reg. v. United Kingdom Elec. Tel. Co.*, 2 B. & S. 647n; *Reg. v. Longton Gas Co.*, 2 E. & E. 664; *Starcy v. Chilworth Co.*, 17 Cox C.C. 58; *Commonwealth v. New Bedford*, 68 Mass. 339. The death of the woman was not the natural consequence of the breach of statutory or other duty.

*A. J. Andrews* for the Crown: *Reg. v. Birmingham Ry. Co.*, 3 Q.B. 223, is the first case of an indictment against a corporation. The Court has power to sentence where none is given by Parliament or where the sentence provided is inappropriate. *Rex v. Thomas*, *Lee's Cases Temp. Hardwicke*, 279; *Hawkins*, P.C., Vol. 2., p. 58, s. 13. In sections 635 to 639, the Criminal Code, 1892, directs the Court to award such judgments as are applicable to corporations. The judgment manifestly applicable is a fine. The common law provided a fine as an alternative for imprisonment. *Chitty on Criminal Law*, Vol. 1, p. 711; *Taschereau*, 959; *Thompson on Corporations*, Vol. 5, § 6418. The death in this case was the direct consequence of the act charged, and this distinguishes the case from *Reg. v. Pocock*, 17 Q.B. 38. A corporation is liable for libel. *Thompson on Corporations*, Vol. 5, § 6421. For any public offence which it can commit, a corporation may be indicted the same as a natural person. *State v. First Nat. Bank*, 51 N.W.R. 587; *Thompson*, Vol. 5, § 6431; *Telegram Newspaper Co. v. Commonwealth*, 52 N.E. R. 445; *United States v. John Kelso Co.*, 86 Fed. Rep. 304;

*State v. Passaic County Society*, 23 Atl. R. 680. An action for malicious prosecution will lie against a corporation. *Cornford v. Carlton Bank*, [1900] 1 Q.B. 22. If there is no punishment there would be no use going to trial and the indictment may as well be quashed.

WINNIPEG, Manitoba, April 9, 1900.

BAIN, J.—

The accused corporation demurs to the first count of the indictment on the ground that it does not charge any indictable offence, and to the second count, which is one in the usual form for manslaughter, on the ground that an indictment for manslaughter will not lie against a corporation.

The first count is objectionable in that it does not more directly charge the accused with having committed a specified indictable offence. But what it contains is sufficient, I think, to give the accused notice that it is charged with having caused the death of the person named, by its negligence; and, for the purpose of disposing of the demurrer, I may treat the whole indictment as one for manslaughter, the alleged homicide having occurred under the circumstances set forth in the first count.

The grounds on which counsel for the Crown supports the indictment are these: By section 220 of the Criminal Code, homicide is declared to be culpable when it consists in the killing of any person either by an unlawful act, or by an omission, without lawful excuse, to perform or observe any legal duty. Then it is provided by section 213 that "everyone who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, with-

out lawful excuse, to perform such duty." This provision, it is urged, applies as well to corporations as to individuals; the Code in sections 635 to 639 makes provision for corporations against which a bill of indictment has been found appearing in the court and pleading or demurring to the indictment and for proceedings in default of appearance; and it is further urged that in case of conviction, the Court can sentence the corporation, by virtue of the provision in section 639 that the Court in case of conviction "may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations."

By section 3, sub-section (2), of the Code the word "persons" and other expressions of the same kind include all public bodies, bodies corporate, societies and companies; and the words "every one" in section 213 are doubtless wide enough in themselves to make the section applicable to corporations. But by the above sub-section (2) these general words are to include bodies corporate, etc., only "in relation to such acts and things as they are capable of doing and owning respectively;" and in support of the demurrer Mr. Howell argues that a corporation as such is not in law capable of committing manslaughter, and that even if it were convicted of such an offence, the law has made no provision for punishing it therefor; and counsel for the Crown concedes that if a corporation cannot be punished after a conviction for manslaughter the indictment will not lie.

The opinion I have come to after consideration is that there is no authority that would justify me in holding that an indictment will lie against a corporation for manslaughter; and that even if a corporation could be indicted and convicted for such an offence, the conviction would be futile, for there is no provision of law under which any punishment could be imposed.

In *Reg. v. Aspinall*, 2 Q.B.D. 48, Brett, L.J., said: "An indictment must contain an allegation of every fact

necessary to constitute the criminal charge preferred by it. As in order to make acts criminal they must always be done with a criminal mind, the existence of that criminality of mind must always be alleged." This criminal or guilty mind has always been an essential element in the legal conception of crime in English law ; and as a corporation, as it used to be said, is invisible and exists only in contemplation of law (Hawkins, P.C., Bk. 1, c. 65, s. 13), and so cannot be actuated by a personal guilty mind, the opinion prevailed at one time that it could not be held criminally liable ; and this view was pressed in argument as late as in *Reg. v. Birmingham and Gloucester Railway Co.*, 3 Q.B. 223. But this guilty mind may legally exist either when the mind is actively or wilfully at fault, or when it is only passively or negatively to blame as in cases of negligence ; and although a corporation can act only through its agents (and it is a principle of law that a principal is not criminally responsible for the acts of an agent) it has come to be settled law that a corporation may in certain cases be held amenable to the criminal law. "Many acts, which, if productive of harm to a single individual are mere torts, become crimes when they result in damage to a large number of people, and all proceedings which are invasions of the rights or privileges, not of some one individual specially, but of the public at large, or which are detrimental to the general well-being or to the interests of the State, similarly fall under the category of crimes." Brice on *Ultra Vires*, p. 441. Crimes of this sort may be described as public torts ; and in regard to these, corporations may be held criminally liable both for non-feasance and for misfeasance. But this is as far as the law has gone ; and, as the law stands at present, it seems that a corporation cannot be made criminally liable for such acts as are spoken of as crimes in the more popular sense of the word, that is, crimes of which the essence is the personal criminal intent or malice, or negligence carried to an extent that it amounts to wilfully incurring the risk of causing injury to others. Whether, if a corporation can be held criminally liable, as it certainly can, for one class of cases

resulting from negligence, it is illogical not to extend its criminal liability to manslaughter resulting from negligence, it is not for me to say ; but sitting as a trial Judge, I cannot say that I have any doubt that, as the law stands at present, I cannot so extend it.

It is admitted that sections 213 and 220 of the Criminal Code merely embody what were well recognized principles of the common law, and that these sections do not extend the criminal responsibility of corporations beyond what it was before they were passed. Now the principles of the common law prevail not only in England and in Canada, but throughout the United States as well ; and in all these countries many fatal accidents like the one in question must have happened through the same kind of negligence on the part of corporations, that is charged here ; and it is a significant fact that, as counsel for the Crown has to admit, no case can be found in which a corporation has been convicted for manslaughter. In a case of this kind the absence of any precedent affords a strong argument against the validity of the indictment ; and, besides this negative authority, there are, also, the opinions of several eminent English Judges to be found in reported cases, that a corporation cannot be indicted for such a crime as manslaughter. Of these cases it will be sufficient if I refer to *Reg. v. Birmingham and Gloucester Ry. Co.*, 3 Q.B. 223 ; *Reg. v. Great North of England Railway Co.*, 9 Q.B. 315 ; *Reg. v. Pocock*, 17 Q.B. 34 ; *Pharmaceutical Society v. London Supply Association*, 4 Q.B.D. 313 ; and nearly all the leading text books, both on criminal law and on corporations, contain opinions to the same effect.

On these grounds I would have to allow the demurrer to the indictment ; but there is the additional objection to it, which, also, I think, would have to prevail, that a corporation cannot be punished for manslaughter. In *Pharmaceutical Society v. London Supply Association*, 5 A.C. 857, Lord Blackburn said : " I quite agree that a corporation cannot, in one sense, commit a crime—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime ; a



corporation cannot be hanged or put to death, if that be the punishment for the crime, and so, in these senses, a corporation cannot commit a crime."

Under the R.S.C. (1886), c. 162, s. 5, which was repealed by the Criminal Code, the punishment for manslaughter was imprisonment for life or "such fine as the Court awards in addition to or without any such imprisonment." But by section 236 of the Code "every one who commits manslaughter is guilty of an indictable offence and liable to imprisonment for life;" and there is now no authority for the substitution of a fine for imprisonment for this offence. The provision in section 958, that "any person convicted of an indictable offence punishable with imprisonment for five years or less may be fined in lieu of or in addition to any punishment otherwise authorized," cannot apply where the imprisonment may be for life; and counsel for the Crown could only suggest that the Court might be able to impose the punishment of a fine under the general provision in section 639, that in case of the conviction of a corporation the Court "may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations." This, however, could not be understood to affect or modify the positive enactment of section 236 that the punishment for manslaughter in all cases is imprisonment; and, besides, if a corporation cannot be convicted for manslaughter, there cannot, of course, be a judgment or sentence applicable to such a conviction.

I think the accused is entitled to have judgment on the demurrer.

*Demurrer allowed.*

**Note:** See the next case.

## [SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE MCCOLL, C.J., DRAKE, IRVING AND MARTIN, JJ.,  
SITTING AS A COURT OF CRIMINAL APPEAL

## THE QUEEN v. UNION COLLIERY CO.

*Corporation—Neglect of duty causing death—Maintaining unsafe railway bridge—Criminal proceedings—Manslaughter—'Grievous bodily injury'—Punishment of corporation by fine—Cr. Code 192, 213, 252, 639, 934.*

1. Although a corporation cannot be guilty of manslaughter, it may be indicted, under Cr. Code sec. 252, for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge or structure which it was its duty to so maintain, and this notwithstanding that death ensued at once to the person sustaining the grievous bodily injury.
2. A fine is the punishment which must be substituted under Cr. Code sec. 639 in the case of a corporation, in lieu of the imprisonment mentioned in Cr. Code sec. 252, and the amount is in the discretion of the court (Cr. Code sec. 934).
3. The expression "grievous bodily injury" includes injuries immediately resulting in death, and as a corporation is not amenable to a charge of manslaughter, the death is as to it a circumstance in aggravation of the crime, and does not enlarge the nature of the offence.

ARGUED: March 7, 1900.

DECIDED: May 8, 1900.

Case reserved for the Court of Appeal by Walkem J., pursuant to section 743 of the Criminal Code as follows:

The defendants were tried and convicted at the Fall Assizes, 1899, at Victoria, before the Honourable Mr. Justice Walkem and a jury, and a fine of \$5,000 imposed. The indictment was as follows:

CANADA, PROVINCE OF BRITISH COLUMBIA, COUNTY OF NANAIMO, — CITY OF NANAIMO. —	}	The jurors for our Lady the Queen present that the Union Colliery Company of British Columbia, Limited Liability, is a Company duly incorporated under the Companies Act, 1878, for the purpose amongst other things of acquiring coal lands in the Province of British Columbia, of extracting the coal therefrom, and of erecting
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and using tramways and roadways necessary for transporting said coal from the mines to the place of shipment :

The jurors aforesaid do further present that the said Company pursuant to the said powers have for a long time past been mining coal near Union in the County of Nanaimo in the Province of British Columbia, and have been transporting said coal from said mines to Union Wharf in said County, the place of shipment thereof along a tramway or railway in cars drawn by locomotives :

The jurors aforesaid do further present that the said tramway or railway is about ten miles in length, and that for some time past the Company have been carrying passengers as well as hauling coal on said tramway or railway between said points :

The jurors aforesaid do further present that the said tramway or railway on the day and year hereinafter mentioned was carried across the valley of the Trent River by trestle work and a Howe Truss Bridge erected several years prior to said date, which truss bridge was about one hundred and thirty-three feet in length, and about ninety-five feet above the bed of the said river, and that the said trestle work and truss bridge were maintained by the said Company :

The jurors aforesaid do further present that in the absence of reasonable precaution and care, the said Howe Truss bridge might endanger human life, and that the said Company were under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger :

The jurors aforesaid do further present that the said Company unlawfully neglected without lawful excuse to take reasonable precautions and to use reasonable care in maintaining the said Howe Truss bridge, and that on the seventeenth day of August, in the year of our Lord one thousand eight hundred and ninety-eight, a locomotive engine and several cars, then being run along said tramway or railway, and across said Howe Truss bridge by said Company, broke down said Howe Truss bridge owing to the rotten state of the timbers thereof, and were precipitated into the valley of the Trent River, thereby causing the death of Alfred Walker, Richard Nightingale, Walter Work, Alexander Mellodo, K. Nanko (Japanese), and Osano (Japanese), who were then on said cars and locomotive, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, Her Crown and dignity.

The question reserved for the opinion of the Court is: Will the indictment lie against a corporation? If this question be answered in the negative, the conviction is to be quashed, otherwise the conviction is to stand.

VICTORIA, B.C., March 9, 1900.

*Duff*, for the accused : Sections 191 and 192 of the Code cannot be invoked as the indictment does not refer to them ; they were not invoked in the Court below. This charge is one of culpable homicide (manslaughter) or nothing, and as the only punishment for that offence is imprisonment (section 236) it cannot relate to corporations. Taschereau at page 206 says that sections 213 and 214 are nothing but additions to the definition of culpable homicide.

*Maclean, D. A.-G.*, for the Crown : I rely on sections 191, 192, 213, and 639. The defendants were common carriers and are responsible to the public in the same way as persons. By section 3 (1) "person" includes a corporation. The charge here is failure to take reasonable precautions quite irrespectively of the fact that such negligence resulted in death. He referred to judgement of Lord Blackburn in *The Pharmaceutical Society v. The London and Provincial Supply Association, Limited* (1880), 5 App. Cas. at p. 869. The Company was not indicted under any particular section : the words of the indictment apply to 192 and 193 as well as to 213. The Company cannot escape liability on the ground that the offence committed was a graver one than the one charged. He cited *The Queen v. The Great North of England Railway Company* (1846), 2 Cox C.C. 70 ; *In re The Queen v. The Toronto Railway Company* (1898), 30 Ont. 224, 2 Can. Cr. Cas. 471 ; Archbold's Criminal Evidence 21st Ed., 7, and *The Queen v. Weir* (1899), 3 Can. Cr. Cas. 102, as to indictment.

*Duff*, in reply : As to the attempt to bring the case within sections 191 and 192 and make it an indictment for a nuisance, it is not alleged in the indictment that the lives, safety, etc., of the public were endangered. See Russell on Crimes, 6th Ed., 731. Section 213 does not create an indictable offence, but simply imposes a responsibility ; there must be some consequences before there can be any liability and if

the consequences are manslaughter then the punishment must be that for manslaughter. Section 639 is merely a procedure section. He cited also *The Metropolitan Saloon Omnibus Company, Limited v. Hawkins* (1859), 4 H. & N. 87 and Pollock on Contracts, 6th Ed. 110 and 111.

VICTORIA, B.C., May 8, 1900.

McCOLL, C.J.—

The question to be determined is whether the Company is liable to punishment under any section of the Code. Section 933.

Section 252 provides that “everyone is guilty of an indictable offence and liable to *two years*’ imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person.”

The term “one” is used throughout the Code as of the same meaning as “person,” and therefore by sub-section (2) section 3, corporations aggregate are within section 252, “in relation to such acts and things as they are capable of doing and owning respectively.” The Company being admittedly liable in damages for injury caused by its default in not maintaining the structure in question in a safe condition, an indictment would lie against it at common law for breach of duty.

The position at common law was stated by Lord Denman, C.J., in 1846, in *Regina v. The Great North of England Railway Company*, 10 Jurist p. 755, to be undisputed, and section 933 leaves the common law in force. Taschereau p. 959.

That being so, to apply section 252 to the Company adds nothing to its criminal responsibility for what it is here charged with. Is the section applicable to it? The Judicial Committee in *Robinson v. Canadian Pacific Railway Company*, [1892] A.C. at p. 487, laid down the rule applicable to a statutory Code as being that if any enactment is in itself “intelligible and free from ambiguity” “the law should be

ascertained by interpreting the language used," and that resort ought not to be had to the pre-existing law except upon some such special ground as that the language is of "doubtful import," or "had previously acquired a technical meaning."

Lord Justice Thesiger in *The Pharmaceutical Society of Great Britain v. The London and Provincial Supply Association, Limited* (1880), 5 Q.B.D., at p. 319, formulates three rules by which to determine whether the term "person"—the equivalent to "one" as used in the Code—includes corporations, holding them not to be included except where "first, the term is expressly interpreted as including them; or, secondly, the context of the Act clearly shews that they are included, or, thirdly, the object and scope of the Act peremptorily require them to be so included, and the context does not clearly negative a construction to that effect."

In my opinion all three conditions exist in the present case. The breach of duty may have been the omission of the Company alone, and even if some person connected with it is also liable, Lord Denman in the judgment referred to shews the great importance to the public of maintaining the liability of the Company as well. The cases of *The Queen v. Tyler and the International Commercial Company, Limited*, [1891] 2 Q.B. 588 (C.A.); and *The Queen v. The Toronto Railway Company* (1898), 2 Can. Crim. Cas. 471, may be usefully considered.

As section 230 defines manslaughter to be culpable homicide not amounting to murder, and section 218 defines homicide to be the killing of a human being by another, a corporation cannot be convicted of such an offence.

But the words "grievous bodily injury" in section 252 have no technical meaning, and in their natural sense include injuries resulting in death, and their being no conflict between this section and any other enactment relating to corporations, it would be most extraordinary if the Company could escape liability merely because the consequences of its breach of duty were more serious than would have sufficed to make it punishable. It was argued that the heading of the group of

sections in which section 252 is found, "Bodily injuries and acts and omissions causing danger to the person," indicates that this section was not intended to apply in case of death. But many of these sections deal with acts and omissions likely to cause death, and one at least (section 255) expressly provides for the case of death caused by an omission, so that any light which may be thought to be afforded in this way is not to the advantage of the Company. The distinction between headings so drawn as to be applicable grammatically to the sections following them and headings "inserted for the purpose of convenience of reference, and not intended to control the interpretation of the clauses which follow" is pointed out in *Union Steamship Company of New Zealand, Limited v. Melbourne Harbour Trust Commissioners* (1884), 9 A.C. at p. 369, where it is in effect laid down that it lies upon the Company to shew, that to hold section 252 includes a corporation is inconsistent with the context or subject matter merely because death has resulted.

What is the effect of death in such a case? If a man is charged with manslaughter for a death caused by breach of duty and the evidence fails as to the death, but shews grievous bodily injury, he may by section 713 be convicted under section 252, and if charged under section 252 and the evidence discloses that death has resulted and the accused is not convicted of the offence charged, the reason is that death creates a new crime. But if the offender is a corporation the death is merely a supervening aggravation which, as it creates no new crime, cannot, it seems to me, affect the crime which already existed. If that be so, then that the death may have ensued at once does not, I think, make any difference, for the injury necessarily precedes the death and is not the less but the more grievous because of such result.

As to the nature of the punishment, section 639 expressly provides that it is to be such as is applicable to corporations and this was well understood to be a fine. Section 934 leaves the amount of the fine to the discretion of the Court.

As to the question of punishment, Lord Blackburn says in *The Pharmaceutical Society v. The London and Provincial*

*Supply Association, Limited* (1880), 5 A.C., pp. 869-870, "I quite agree that a corporation cannot, in one sense, commit a crime—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime ; a corporation cannot be hanged or put to death if that be the punishment for the crime ; and, so, in those senses a corporation cannot commit a crime. But a corporation may be fined, and a corporation may pay damages ; and therefore I must totally dissent, notwithstanding what Lord Justice Bramwell said, or is reported to have said. I must really say that I do not feel the slightest doubt upon that part of the case."

It was argued that section 639 only enables a fine to be imposed if the corporation does not appear, that is, in effect that it is left to the accused in any case to evade punishment by the easy expedient of simply appearing. Such a construction is of course out of the question unless the words used are incapable of a sensible meaning. I have not been forced to the conclusion that when Parliament imposed upon the Courts the duty of convicting corporations guilty of offences under section 252 and others applicable to corporations, Parliament at the same time purposely left the Courts impotent to punish except at the will of the accused themselves. I say purposely, for it is incredible that an error so serious should have remained uncorrected during all the time which has elapsed since the Code was passed, though many amendments have since been made. The form of the indictment is perhaps not artificial, but it is, I think, sufficient at this stage in the way the case is stated. *The Queen v. Weir* (1899), 3 Can. Cr. Cas., p. 102.

DRAKE, J. (dissenting)—

The defendants, a corporation, are indicted for that the said Company unlawfully neglected, without lawful excuse, to take reasonable precautions and to use reasonable care in maintaining the Howe Truss Bridge (a bridge erected by the Company across the Trent River and forming part of the defendants' railway), and that on the 17th of August, 1898, a



locomotive engine and several cars then being run along the said tramway or railway and across the said Howe Truss Bridge, owing to the rotten state of the timbers thereof were precipitated into the valley of the Trent River, thereby causing the death of certain named persons. The defendants were found guilty, and a fine was inflicted. The question reserved for us is whether this indictment will lie against a corporation.

Sub-section 1 of section 3 of the Criminal Code includes in the expressions "person," "owner" and other expressions of the same kind, bodies corporate. The expression here is "everyone," and *prima facie* that includes a corporation.

Section 213 enacts that everyone who erects, makes or maintains anything which in the absence of precaution or care may endanger human life is under a legal duty to avoid such danger and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

Sections 191 and 192 were referred to, and it was argued that the indictment could be supported under any section in the Code which had reference to the offence charged. Section 191 defines a common nuisance as an act or omission which endangers the lives or safety of the public or by which the public are obstructed in the enjoyment of any common right. The public in its ordinary meaning refers to the community at large, and when applied to property or rights, means rights or property common to the enjoyment of all persons. The indictment does not allege the infringement of any duty to the public at large, and I do not think this section applies to the present indictment. Then we have section 192 which says: "Everyone is guilty of an indictable offence and liable to one year's imprisonment or fine who commits any common nuisance which endangers the lives, safety or health of the public." This is still limited to endangering the lives, health or safety of the public, but it proceeds, "or which occasions injury to the person of any individual." Both the offences here indicated, the one of potential and the other of actual injury, must arise out of the

committal of a common nuisance. Unless this is shewn these sections do not apply.

Section 213 makes the neglect of reasonable precautions when there is a legal duty to take such precautions not a criminal offence, but makes the person responsible, criminally liable for the consequences; therefore whatever neglect of duty may have existed, that does not constitute an offence under this section, but if that neglect is followed by consequences injurious to the individual, then criminal responsibility arises.

The criminal liability of a corporation aggregate for breaches of duty is no new law. This liability has been frequently affirmed in the English Courts. In *The Queen v. The Great North of England Railway Company* (1846), 9 Q.B. 314 at p. 326, Lord Denman says: "Some dicta occur in old cases. 'A corporation cannot be guilty of treason or felony,' and it might be added 'of perjury, or offences against the person'; but it is liable for assault committed by its servants if authorized by them; it is also liable for libel, trespass and for misfeasance."

The indictment charges the Company with the death of certain persons owing to their neglect of duty. This is a charge of manslaughter, the punishment of which is a term of imprisonment for life. A corporation cannot suffer imprisonment, and therefore the punishment laid down in the Code is not applicable to such a body.

The Code by section 252 makes any person who by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person, liable to two years' imprisonment. This section, if the indictment had alleged grievous bodily injury alone to some individual, might have been invoked in order to make section 958, under which the fine was inflicted, applicable, but the indictment as I read it is an indictment for manslaughter.

Does the term 'grievous bodily injury' apply when death results from the neglect of duty? I do not think that the

use of the term bodily injury is of any greater import than bodily harm. In either case when death ensues bodily harm or injury has been done. But the penalties are distinct, and in the case of *Reg. v. Friel* (1891), 17 Cox C.C. 325, Williams, J., held that when there had been a summary conviction for assault, and the person assaulted dies of the injuries, a plea of *autre fois convict* is no answer to an indictment for manslaughter, because the death is a new fact, not a mere matter of aggravation, or a mere consequence, because in cases of manslaughter based on death resulting from culpable negligence there is no criminal offence unless death ensues and gives rise to a charge of manslaughter. On this last remark of the learned Judge, the section 252, which I am now considering, is not in the English Act, but when death ensues the offence is no longer grievous bodily injury but culpable homicide.

The object of an indictment is to enable the defendant to know what case he has to meet. The necessary facts must be set out with certainty, but there is no necessary form of words to make a perfect indictment if all essential allegations are contained in it, and if the offence created by the statute is in substance charged. The question whether this indictment is good or bad is not before us, but it certainly does not indicate to the defendants that they are called upon to plead to a case of grievous bodily injury. They are called upon to plead to an indictment for unlawfully causing the death of certain individuals, which would be culpable homicide, and a corporation cannot be tried on such an indictment. In my opinion the question submitted to us must be answered in the negative.

IRVING, J., concurred with DRAKE, J.

MARTIN, J.—

In this matter the question reserved for this Court is—Will the indictment lie against a corporation?

In regard to the point raised as to the offence being a nuisance (sections 191 and 192), I need only add to the

remarks of my brother Drake that the lucid notes on said sections to be found in Crankshaw fully support the view taken as to the nuisance thereby dealt with being in each case a common one.

Section 213 I regard as merely laying down a principle of criminal responsibility, and liability to be indicted arises only in the event of consequences resulting which are offences against the criminal law. A careful consideration of Part XVI of the Code, which embraces sections 209-217 under the heading "Duties tending to the preservation of life," seems to make this clear. Further, it is significant that in the schedule of forms of indictment under said Part, forms are given to be used in connection with all the sections in the Part except the three sections of a declaratory nature, *i.e.*, 212, 213 and 214.

The consequences for which a corporation may be made responsible by said section 213 cannot be manslaughter, because, as pointed out by the learned Chief Justice, the definitions of homicide and manslaughter contained in sections 218 and 230 restrict that crime to a "human being." The defendant Company, then, was not, and could not have been indicted for manslaughter since it is a physical impossibility that it could have committed that offence, or any other which infers a physical existence, *e.g.*, rape. As Lord Denman said in *The Queen v. The Great North of England Railway Company* (1846), 9 Q.B. 326, "nobody has sought to fix them (corporations) with acts of immorality," The defendant Company, not being a human being, had no reason to suppose that it was being indicted for an offence that could only have been committed by a human being, so the question here is—What offence was it indicted for? The only offence mentioned in the Criminal Code which it was called upon to answer is that set out in section 252. If a "human being," to quote section 218, had been arraigned under this indictment, I have no doubt that he would have, under the criminal practice of to-day, by reason of the beneficial results of recent enactments and decisions, been entitled to suppose that he was charged with manslaughter,

because even though the indictment does not use the historic words "kill and slay," or "manslaughter," which are mentioned in the forms of indictment under Title V of the Code, yet section 611, wherein the present requirements of an indictment are specified, provides that the statement of the offence "may be made in popular language without any technical averments or any allegations of matter not essential to be proved," and that such statement may be "in any words sufficient to give the accused notice of the offence with which he is charged." The effect of this section has been considered in the case of *The Queen v. Lapierre* (1897), 1 Can. Cr. Cas. 413, and again quite recently in *The Queen v. Weir* (1899), 3 Can. Cr. Cas. 102. In the latter case at p. 107, Mr. Justice Wurtele says, referring to an indictment then in question :

"The language used is certainly ungrammatical, and the drafting or wording of the indictment is faulty in construction, but as it contains a statement of all the facts and circumstances which are essential to constitute the offence created by section 99 of 'The Bank Act,' it is not bad on that account."

But though, under the above authorities, the indictment is so framed that now, but not formerly, a "human being" might have been justified in thinking the charge he had to meet was manslaughter, what does it contain that, so far as the Code is concerned, would give a corporation any ground or reason for believing that it had to meet any other charge than one of causing grievous bodily injury under section 252? After mature reflection I am constrained to answer, nothing. It is not as though there was any other statute, or section in the Code, relating to the offence, or that any new offence had been created unknown to the common law, or that, so far as the defendant Company is concerned, any other charge might be brought against it upon the indictment. So this is not a case where a defendant Company might not be able to gather from the indictment what statute it was charged under, because, as has been seen, there is only one section of the Code which is applicable. Nor could any question arise

as to whether the offence charged was against the common law or statute, because the language used and the evidence would be the same in either case. That this indictment may be supported at common law I do not understand to be disputed.—*The Queen v. The Great North of England Railway Company* supra, followed in *The Eastern Counties Railway Company and Richardson v. Broom* (1851), 6 Ex. 314; and *Whitfield v. The South Eastern Railway Company* (1858), E.B. & E. 114, in which last mentioned case Lord Campbell, C.J., said “an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, although not by imprisonment.”

I have considered the case of *Reg. v. Friel* (1891), 17 Cox C.C. 325, but the circumstances therein differ so materially from the case at bar that I am unable to derive assistance from it.

In view of the fact that the judgment of the learned Chief Justice, which I have had the benefit of perusing, exactly expresses my views of the case, it is unnecessary to give at greater length my reasons for answering the question in the affirmative.

*Conviction affirmed.*

(Per McCOLL, C.J., and MARTIN, J., affirming WALKEM, J.)

**Note :**

An appeal to the Supreme Court of Canada from the above decision is now pending.

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., IN CHAMBERS.

## THE QUEEN v. BURTRESS.

*Magistrate—Summary trial of indictable offence—Aggravated assault—Conviction—Omission to recite consent of accused—Want of form—Costs—Default in paying fine—Imprisonment with hard labour—Jurisdiction—Forfeiture of fine—Cr. Code 783 (c), 788, 800, 859, 955 (6).*

1. A summary conviction by a magistrate in respect of a charge in which he has jurisdiction only upon the consent of the accused to a summary trial, is not invalid merely because it omits to state that the accused so consented if in fact the consent was given.
2. The omission to state the consent in the conviction is a 'want of form' which is cured by Code section 800 which provides that a conviction under part LV. shall not be quashed for want of form.
3. A magistrate summarily trying, with the consent of the accused, a charge of aggravated assault has jurisdiction to award costs against the accused as well as to impose both fine and imprisonment.
4. Imprisonment with hard labour may be imposed in default of payment of a fine and costs upon a summary trial of an indictable offence under part LV. of the Code.
5. A conviction upon a summary trial of an indictable offence, whereby it is adjudged that, in addition to the imprisonment ordered, the accused do 'pay a fine of \$5 to be paid and applied according to law' is invalid for want of any adjudication of forfeiture of the fine, and the accused imprisoned under a warrant of commitment based thereon should be discharged upon habeas corpus.

*The Queen v. Crowell*, 2 Can. Cr. Cas. 34, followed.

DECIDED : August 2, 1900.

Application for discharge of the prisoner, Charles Burtress, from custody made upon the return of a writ of habeas corpus.

The prisoner was convicted by the magistrate of Truro, N.S., after a summary trial under Part LV of the Criminal Code, upon a charge of aggravated assault, the conviction being as follows :

"Be it remembered that Charles Burtress is convicted before the undersigned for that he, the said Charles Burtress, did in Truro aforesaid commit an aggravated assault upon

Harvey Burris, and I adjudge the said Charles Burtress for his said offence to be imprisoned in the county gaol at Truro . . . and there kept at hard labour for the period of two months, and also to pay a fine of \$5 to be paid and applied according to law, and also to pay to the said Harvey Burris the sum of \$7.75 for his costs in this behalf; and if the said sum of \$5 and costs be not forthwith paid, I adjudge the said Charles Burtress to be imprisoned in said county gaol for the further period of one month with hard labour, unless the said sum of \$5 and costs be sooner paid."

HALIFAX, N.S., August 2, 1900.

RITCHIE, J.—

The first ground relied on was that the warrant was bad, and was not based on a valid conviction, because it did not appear therein that the magistrate had jurisdiction to impose such a penalty, it not having been stated that the trial took place with the consent of the accused. No doubt the general principle is that the conviction must shew the jurisdiction of the magistrate, but in this case I think the defect is covered by s. 800 of the Code. In this case it is admitted that the accused did consent to his being tried summarily for the offence, and this defect is merely an omission to state what actually took place at the trial, and is, in my opinion, within the terms of the section, and the conviction is in that respect good and valid. A similar point was, I think, raised last winter in a case under part LVI of the Code, where a conviction was sustained which omitted to shew the jurisdiction by stating that the accused appeared to be under sixteen years of age.

Another ground was that the magistrate had no authority to award costs, but I think that s. 788 of the Code, which defines the punishment clearly, implies that costs are to be awarded and I find that the same view has been taken in Ontario: see *Regina v. Cyr*, 12 Ont. Pr. 24.

A further ground was that the accused could not be



sentenced to hard labour, in default of the payment of the fine and costs, and a decision of this Court was cited in support of such contention : but it will be found that the case relied on was under part LVIII of the Code, in which the provisions are different, and I think a fair reading of s. 788 is that the imprisonment in default of the payment of a fine and costs is to be for a further term and of the same nature as that mentioned in the first part of the section. Besides this, s. 955, s.-s. 6, which applies to all imprisonments under Part LV of the Code, leaves it to the discretion of the Court whether the imprisonment shall be with or without hard labour.

A still further ground taken was that the conviction was bad because it did not adjudge that the accused should *forfeit* and pay a fine of \$5. In the schedule of forms given to Part LV of the Code there is none of a conviction which imposes a money penalty as well as imprisonment, but in all the forms of convictions on summary trials before justices or a stipendiary magistrate in which a money penalty is imposed, the words of adjudication are that the accused "shall *forfeit* and pay," and I think that is the proper mode of stating it. This point has been decided in Ontario in *Regina v. Cyr*, 12 Ont. Pr. 24, and also by Mr. Justice Meagher in December, 1897, in the case of *The Queen v. Crowell*, 2 Can. Cr. Cas. 34.

The application of accused has no merits whatever, and I am not without some doubt as to the validity of the last mentioned objection, but, as his liberty is at stake, I think it must prevail; and the said Charles Burtress will be discharged from custody under said warrant of commitment, on his giving an undertaking to bring no action against the magistrate or gaoler or the officers who executed the warrant.

*Order for discharge.*

**Note :** *Jurisdiction of magistrate—Hard labour in default of distress—Cr. Code 788, 872 (c).*

It will be observed that the proceedings in *Burtress' Case*, supra, were under the "Summary Trials" clauses of the

**Note—Continued.**

Code (783-808), under which the magistrate has power to try certain indictable offences with the consent of the accused. Where the charge is in respect of an offence not indictable, but punishable on summary conviction only, the provisions of the "Summary Convictions" clauses (839-909) are applicable, and not the clauses relating to "Summary Trials." Under the "Summary Convictions" clauses it was held by the Supreme Court of Nova Scotia in *The Queen v. Horton*, (*ante*, p. 84) that, on a summary conviction under Code sec. 501, for wilfully and unlawfully killing a dog, hard labour could not be imposed in default of payment of the fine and costs although the magistrate had jurisdiction to impose imprisonment instead of a money penalty in the first instance, and in that case to make it either with or without hard labour. This incongruity has been removed by the Criminal Code Amendment Act, 1900, which goes into force January 1, 1901, by adding a new sub.-section (1c) to section 872, the effect of which is to nullify the decision in *The Queen v. Horton*. By this amendment whenever a conviction adjudges a pecuniary penalty or compensation to be paid, or an order requires the payment of a sum of money, and whenever under such Act or law imprisonment with hard labour may be ordered or adjudged in the first instance as part of the punishment for the offence of the defendant, the imprisonment in default of distress or of payment *may* be with hard labour. It is discretionary with the magistrate whether or not to inflict hard labour under this amendment. The statute gives him the power, but does not say that he must imprison at hard labour in default of distress.

*Summary conviction—Necessity for an adjudication of forfeiting of fine—Cr. Code 859.*

A conviction for keeping a house of ill-fame was held defective in *R. v. Cyr* (1887) 12 Ont. Pr. 24, per O'Connor, J., because it did not contain an adjudication of forfeiture of the fine imposed, as well as an adjudication that the prisoner pay such sum. Reference was in that case

**Note—Continued.**

made to the statute 32 and 33 Vict. (Can.), c. 31, s. 50 whereby forms I1, I2 and I3 in which the expression "forfeit and pay" is used are made applicable to all cases where no particular form is given by the law creating the offence; and that in cases where forfeiture is neither necessary nor proper and where only an order to pay money due by one person to another can be made (as in cases between master and servant) the statutory forms contain no expression of forfeiture. The opinion is also expressed in Paley on Convictions, 6th ed., 264, that a judgment of forfeiture is necessary under the corresponding Imperial statute, 11 and 12 Vict., c. 34.

## [SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

BEFORE ROULEAU, WETMORE, AND SCOTT, JJ.

## THE QUEEN v. COVENTRY.

*Duty to provide necessities—Contract for placing a child out to service—Master not liable as a “guardian” or “head of a family”—Failure to provide medical aid—Proof of permanent injury to health—Expert evidence—No inference from necessity of amputation—Cr. Code, 209, 210, 211.*

1. A person who engages the services of a child under sixteen years, placed out with him by his legal guardian under a contract for the child's services for a fixed period, whereby the party with whom he is placed engages to furnish the child with board, lodging, clothing, and necessities, is not as to such child a “guardian or head of a family” so as to become criminally responsible, as such, under Cr. Code sec. 210, for omitting to provide “necessaries” to such child while a member of his household.
2. The relationship in such case is that of master and servant, and comes within the provisions of Cr. Code sec. 211, under which the master is criminally responsible only in respect of a failure to provide “necessary food, clothing, or lodging.”
3. Section 211 of the Code does not impose a criminal responsibility upon the master to provide the servant with medical attendance or medicine, and, *semble*, per Rouleau, J., medical aid is not within the term “necessaries” under Cr. Code, 210.
4. The Court should not, without expert evidence upon the effect of the loss of a child's toes resulting from exposure to cold, and their consequent amputation, infer that the child's health had thereby been or was likely to be “permanently injured” (Cr. Code, 211), or that his life has thereby been endangered.

ARGUED : June 6, 1898.

DECIDED : June 15, 1898.

Crown case reserved by RICHARDSON, J.

Accused who was in charge of a child of the age of twelve years was charged with omitting, contrary to section 209 of the Criminal Code, to provide the child with the necessities of life, by reason whereof his health was and is likely to be permanently injured. He was also charged under

section 210 of the Criminal Code with being the "head of the family" and guilty of a like omission. He was also charged under section 211 of the Criminal Code with being the master of an apprentice under the age of sixteen years and omitting to provide the apprentice with the necessary clothing, lodging and necessaries, whereby his health was permanently injured and his life was endangered. The evidence showed that the boy had his feet frozen while in accused's employ, that he was in bed for three weeks; that he told the accused four or five days before going to bed that his feet were sore, and accused told him to get hot water; that he had seen the boy's feet after he was confined to bed and had bathed them and put fresh rags on; the boy had been wearing a pair of old moccasins too large for him; that his socks and moccasins had holes in the heels and toes. The boy went into accused's house to get his feet warm and accused sent him out to cut more wood. He was removed to the Winnipeg hospital and remained there three months, and his toes were all amputated. The old moccasins were the only articles of clothing supplied by accused.

The accused was tried before the Honorable Mr. Justice Richardson and was convicted.

The material sections of the Code are as follows :—

209. Every one who has charge of any other person unable, by reason either of detention, age, sickness, insanity or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is, whether such charge is undertaken by him under any contract, or is imposed upon him by law, or by reason of his unlawful act, under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting, without lawful excuse, to perform such duty if the death of such person is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission.

210. Every one who as parent, guardian or head of a family is under a legal duty to provide necessaries for any child under the age of sixteen years, is criminally responsible

for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of such child is caused, or if his life is endangered or his health is or is likely to be permanently injured, by such omission.

2. Every one who is under a legal duty to provide necessaries for his wife, is criminally responsible for omitting, without lawful excuse so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured, by such omission.

211. Every one who, as master or mistress, has contracted to provide necessary food, clothing or lodging for any servant or apprentice under the age of sixteen years is under a legal duty to provide the same, and is criminally responsible for omitting, without lawful excuse, to perform such duty, if the death of such servant or apprentice is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission.

REGINA, ASSA., June 6, 1898.

*W. B. Willoughby*, for the accused : Section 209 of the Code is not applicable : *R. v. Morby* (1882), 8 Q.B.D. 571, 574; *R. v. Smith*, 34 L.J.M.C. 153. Neither section 209 nor section 210 applies to the case of a mere servant. The boy was a servant, not an apprentice : Wharton's Law Lexicon, title "Apprentice;" *R. v. Inhabitants of Bingay*, 5 A. & E. 676; *R. v. Inhabitants of Northowram* (1846), 9 Q.B.N.S. 24. Medical aid is not within the term "necessaries:" *R. v. Downes*, 1 Q.B.D. 25; *R. v. Nasmith* (1877), 42 U.C.Q.B. 242. There is no evidence of permanent injury to health. "Health" means "that condition of a living organism and of its various parts and functions which conduces to efficient and prolonged life."—Century Dictionary.

*T. C. Johnstone*, for the Crown: Medicine and medical aid are included in the term "necessaries:" *R. v. Smith*, 8 C. & P. 153; Taschereau's Criminal Code, page 145. If neither section 210 or 211 applies, then section 209 covers the

offence. There is a liability at common law : *Taschereau*, p. 959. There is evidence of permanent injury to health.

REGINA, ASSA., June 15, 1898.

ROULEAU, J.—

This is a Crown case reserved by Mr. Justice Richardson. The following questions are submitted to this Court :—

1st. "Does the legal duty created by section 210 (Criminal Code) to provide necessities for a member of a family by its head, include providing medical aid, under circumstances as disclosed in this case?"

2nd. "Was there any evidence of permanent injury to health, or the likelihood of any permanent injury to health, as charged?"

3rd. "Can the conviction be sustained under either of the counts founded upon section 210?"

4th. "If the conviction cannot be sustained under section 210 as charged, can it be sustained under any other count of the charge?"

The accused made an application to the Canadian agent of Dr. Barnado's Homes respecting a boy whom he wanted to engage. In compliance with that application Alfred B. Owen, Canadian agent of Dr. Barnado's Homes, agreed to engage John Sargent, aged 12 years, an inmate of the said Homes, and who was under the guardianship of the managers of the said Homes, to F. A. Coventry, of section 28, township 15, range 24, Moose Jaw, for a period dating from the 12th day of June, 1897, and ending on the 1st day of April, 1902, and Coventry to furnish him during that period with board, washing, lodging, clothing and necessities, and to pay to the said Alfred B. Owen, or other authorized agent of Dr. Barnado's Homes, in trust for the said John Sargent, the sum of one hundred and twenty dollars, at the expiration of the above mentioned period.

Under this agreement I cannot bring my mind to understand how section 210 of the Criminal Code would apply to this case, inasmuch as it enacts that "everyone who as parent, guardian, or head of a family is under a legal duty to provide necessaries for any child under the age of sixteen years is criminally responsible for omitting, without lawful excuse, to do so, . . ." if the health of such child is likely to be permanently injured by such omission.

The accused in this case was neither the parent nor the guardian of the boy Sargent; nor could it be contended that said boy formed part of Coventry's family, so that he (Coventry) might have been designated as the "head of a family" including the said boy, because the legal guardian of the said boy had a written agreement to engage him to the accused under the conditions already mentioned. If the accused could be indicted under this section, I do not see the necessity or utility of section 211 which enacts that "everyone who, as master or mistress, has contracted to provide necessary food, clothing, or lodging for any servant or apprentice under the age of sixteen years, is under a legal duty to provide the same, and is criminally responsible for omitting, without lawful excuse, to perform such duty, if the death of such servant or apprentice is caused, or if his life is endangered, or his health has been, or is likely to be, permanently injured by such omission."

It seems to me that the accused can only be indicted under this section, and that his relations between himself and the boy Sargent were clearly those of master and servant under the said agreement.

This being the case the responsibility of a master towards his servant is not so great as the responsibility of a parent, head of a family, or guardian towards a child while remaining a member of his household under section 210.

Taschereau (Commentaries on the Criminal Code) at p. 145, says: "The difference in the two sections, 210 and 211, between *necessaries* and *necessary food, clothing or lodging* is a right one. A parent is obliged to supply his child, or a husband his wife, with all the necessaries of life which would



include medical attendance, whilst a master is only obliged to provide his servant or apprentice with the necessary food, clothing or lodging which he has contracted to so provide."

To support this difference Taschereau refers to the case of *The Queen v. Downes*, 1 Q.B.D. 25. In reading this case I find that it does not support the contention that the word *necessaries* includes medical aid. The accusation in that case was brought under section 37, ch. 122, 31 and 32 Vict., which specially provides that "medical aid" should be given to a child by his parent. Lord Coleridge, C.J., said: "Speaking for myself alone, I may say that had it not *been* for the statute to which we have been referred, I should *have* entertained great doubt upon this case. The statute makes it an offence, punishable summarily, wilfully to neglect to provide adequate medical aid for a child."

Bramwell, B., was of the same opinion, and he added: "I agree with my Lord Coleridge as to the difficulty which would have existed had it not been for the statute. But the statute imposes an absolute duty upon parents."

Even if the accused has been tried under section 210, in my opinion there would still be a great doubt whether the head of a family or guardian would have been guilty of an offence for neglecting to provide medical aid. It seems clear that the same contention cannot be reasonably argued with regard to section 211 for the word "necessaries" is not included. The only offence provided is the omission to provide necessary food, clothing or lodging contracted for, and it is needless to say that this section of the Code cannot be supplemented by an agreement. Having, therefore, come to the conclusion that section 210 of the Criminal Code does not apply to this case, it is not necessary for this Court to advise the learned Judge as to the first question.

As to the second question I must draw a line somewhere. I can only discover the line by reference to the evident scope and purpose of the enactment. It is plain that the object of the law is to protect the servant from such injury as would likely impair his health permanently, and not

from an injury that would only be of a temporary effect on his health. In its ordinary sense the word "health" means: "The general condition of the body with reference to the degree of soundness and vigor, whether normal or impaired," also "that condition of a living organism and of its various parts and functions which conduces to efficient and prolonged life." Having laid down these definitions, given by the best authority which I could find, is this Court in a position to determine under the evidence adduced, that this boy, having lost his toes, consequent of frost bites, has impaired his living organism so as to affect or shorten his life? As far as I am concerned, I am not prepared to say. It seems to me that expert evidence should have been given to enlighten the Court upon the consequence of such an injury, on the health of that boy. Without that evidence the Court is left only to surmise what is the effect of such an injury that is likely to permanently injure the health of said boy. My answer to the second question would therefore be the following: The Court is not justified to decide under the evidence that the injury suffered by that boy was of such a nature as to permanently injure his health or to be likely to do so.

Having decided already that section 210 does not apply to this accusation, the only answer that can be made to the third question is in the negative.

To the fourth question I am of opinion that section 211 is the only section applicable to the circumstances of this case, and that a conviction might be sustained, with sufficient evidence, under paragraphs 5 and 7 of the indictment. As to the contention that paragraphs 6 and 8 come within the purview of the common law, I am of the opinion that these paragraphs, being in the exact words of the Code, were not intended and drafted as charges under the common law, and I am further informed by the learned trial Judge that no such claim was ever made during the trial. In conclusion, as there was no evidence before the Court to shew that by the injury caused to the boy his health was, or was likely to be, permanently injured, I am of opinion that there was no case

to be left to a jury, and that, therefore, the conviction should be quashed.

WETMORE, J.—

I am of opinion that the contract upon which the boy John Sargent came to the accused was a contract establishing between them the relationship of master and servant and not that of master and apprentice. The question whether a legal duty or obligation was cast on the accused, the omission to perform which would render the accused criminally responsible, depends entirely upon whether the duty or responsibility arises by virtue of either sections 209, 210 or 211 of The Criminal Code, 1892. The counsel for the Crown urged that offences at common law were charged in the sixth and eighth paragraphs of the charge. The learned Judge who reserved this case informs us that no such contention was made before him. And if such contention had been made the evidence failed to prove the charge laid in the sixth paragraph, because that paragraph alleged the obligation to arise by virtue of the relationship of master and apprentice having existed between the accused and the boy. As a matter of fact there was no evidence of any such relationship. But apart from this, I can find no case where criminal liability at common law has been held to be established by reason of the matters set out in either the sixth or eighth paragraphs of the charge. Even assuming there was an obligation or duty on the part of the master to furnish a servant or apprentice under the age of sixteen with food, clothing, lodging and necessities, and he omitted to do so, and by reason thereof the servant or apprentice became, or was likely to be, permanently injured in health, no criminal responsibility was established at common law. Cases may be found when death was caused by such omission a criminal responsibility was established.

Then was a criminal responsibility cast on the accused by virtue of any omission to perform a duty or obligation under sections 209, 210, or 211 of the Code? I am very clearly of

opinion that section 210 does not apply to the circumstances of this case at all, because I am of opinion that the duty, referred to in that section, upon a parent, guardian, or head of a family, is a duty in the nature of the natural duty cast upon such person, for instance, the natural duty of a parent to provide necessaries for his child. No such natural duty was cast upon the accused in this case in respect to the boy Sargent. Unquestionably there was an obligation of the accused by virtue of section 211, the omission to perform which, without lawful excuse, would render him criminally responsible if the consequences followed thereupon as therein expressed. But there was no obligation on the accused by virtue of that section to furnish medical attendance or medicines. I have very great doubts whether a legal duty was cast upon the accused by virtue of section 209, and if it was, whether he was thereunder bound to supply medical attendance or medicine. But I do not feel myself called upon to decide either of these questions just mentioned arising under section 209, because in my opinion there was no evidence to establish that the health of the boy had been, or was likely to be, permanently injured by reason of any omission established by the evidence.

It is quite true that the boy's toes were amputated or fell off, and there was evidence from which it might be found that this was the result of negligence on the part of the accused, and it is quite clear without the aid of expert testimony that the loss of the toes would be a permanent *bodily* injury, but the loss of the toes would not necessarily be a permanent injury to *health* as I understand the expression.

A person may have a limb amputated but his organs of health may be perfect. One would not in ordinary popular language speak of such a person as being a person in bad health. It is true the doctor stated that if no medical aid had been called the toes would have dropped off, and after some months the wounds would have healed up leaving painful stumps. The painful stumps, I take it, would have been a temporary not the permanent result. There is no evidence that these painful stumps would be the permanent result.

Anyway, this testimony refers to a state of things which would have occurred if no doctor had been called in. As a matter of fact a doctor was called in. I am of opinion that in order to warrant a conviction of the accused under any of the charges, there should have been expert testimony to establish either that the health of the boy had been or was likely to be permanently injured by the omission of the accused, and that there was no such testimony.

The answers to the second, third and fourth questions put by the learned Judge in the case reserved should be "no." And the conviction of the accused should be ordered to be quashed. In view of the answers given to the second, third, and fourth questions it is not necessary to answer the first question.

SCOTT, J., concurred.

*Conviction quashed.*

**Note :** Compare with the above on the question of permanent injury to health, *The Queen v. McIntyre*, ante page 413, a decision by the Supreme Court of Nova Scotia.

## [COURT OF APPEAL FOR ONTARIO.]

BEFORE OSLER, MACLENNAN, MOSS AND LISTER, JUSTICES OF  
APPEAL.

## THE QUEEN v. ST. CLAIR.

*Summary trial—Being inmate of bawdy house—Evidence of reputation and disorderly conduct—Evidence in prior trial of another person as keeper—Consent to use of, as evidence in charge of being inmate—Cr. Code part LV—Absolute jurisdiction of magistrate—Review on habeas corpus—Issuing writ of habeas corpus—Practice—Cr. Code 207, 690, 783, 784, 798.*

1. A summary conviction by a magistrate in respect of a charge under part LV of the Code of an indictable offence which the magistrate has absolute jurisdiction to try without the consent of the accused, is subject to be enquired into upon habeas corpus and certiorari proceedings, notwithstanding the provision of sec. 798 declaring that it shall have the *same effect* as a conviction upon an indictment.
2. If there was some evidence before the magistrate which would support a conviction unless he gave credence to the evidence given on behalf of the accused, the conviction will be sustained, the weight to be attached to the evidence not being a question reviewable upon habeas corpus and certiorari.
3. On a charge of being an inmate of a bawdy house it is competent for the accused or her counsel to consent that the evidence which had been given before the magistrate upon a concluded trial of another person for keeping the bawdy house, should be read as evidence in the case.
4. A conviction should not be made upon a charge of keeping, or being an inmate of, a bawdy house upon evidence of general reputation only, and the prosecution should be required to produce proof of acts or conduct from which the character of the house may be inferred.
5. The conduct and statements of the inmates of an alleged bawdy house at the time of their arrest therein may properly be proved in support of the charge.
6. A writ of habeas corpus issued in Ontario in a criminal matter should be signed by the judge who awarded it, as well as by the officer who issues it.

ARGUED : January 17, 1900.

DECIDED : January 31, 1900.

Appeal from the judgment of Falconbridge, J., refusing

an application for the prisoner's discharge upon habeas corpus.

*E. B. Stone*, for the appellant.

*John R. Cartwright*, Q.C., for the Crown.

TORONTO, January 31, 1900.

The judgment of the Court was delivered by

OSLER, J.A.—

The appellant was convicted before the police magistrate of the town of Peterborough for that she was, on the 21st of November, 1899, an inmate of a bawdy house or house of ill-fame in the said town, and she was sentenced to be imprisoned in the Mercer Reformatory at Toronto for six months.

The conviction was made under secs. 783 and 784 of the Criminal Code, Part LV., "Summary trial of indictable offences."

A certiorari was issued in aid of the habeas corpus under which the magistrate returned the conviction and the examinations and other proceedings concerning the same. The motion for her discharge having been refused, the prisoner now appeals to this Court, pursuant to sec. 6 of R.S.O. ch. 83.

The writ of habeas corpus is marked in the margin "*Per statutum tricesimo primo Caroli Secundi Regis*," and is issued from the High Court, but is not signed by the Judge who awarded the same, as it ought to have been. The return, or what purports to be the return, of the gaoler does not certify the cause of detention as it ought to have done, but it has been assumed, no doubt correctly, that it is under the warrant of commitment annexed to the writ. The writ itself does not appear to have been filed at any stage of the proceedings, and it would not be difficult to point out other indications of the increasing laxity and slipshod style of modern practice.

It was objected that such a conviction as the one in question could not be reviewed by means of the writs of habeas corpus and certiorari, and the decisions were cited in reference to cases arising under Part LIV. of the Code, secs. 762-781, "Speedy trials of indictable offences."

The conviction is a summary conviction, like that in question in *Regina v. Gibson* (1898) 2 Can. Cr. Cas. 302, 29 Ont. R. 660, under Part LV. of the Code, upon a charge the jurisdiction of the magistrate to try which is absolute, not dependent upon the consent of the accused, and which is probably subject to be set aside on motion on proper grounds.

Such a conviction, although a record or matter of record in the sense in which all summary convictions by justices are so (Paley on Convictions, 5th ed., pp. 157, 158) is of a different character from the judgment of the Court of Record expressly constituted as such under Part LIV. of the Code, and I therefore see no reason why it should not be enquired into upon habeas corpus and certiorari in the same manner and to the same extent as any other summary conviction. Section 798 no doubt says that such a conviction shall have the same effect—whatever that may now mean—as a conviction upon an indictment for the same offence, but nevertheless it is not the same thing.

Compare the cases upon garnishment orders, which have "the effect of," but yet are not "judgments": *Cremetti v. Crom* (1879), 4 Q.B.D. 225; *In re Frankland* (1872), L.R. 8 Q.B. 18; *Best v. Pembroke* (1873), L.R. 8 Q.B. 363.

On the question of the purpose and extent of the Ontario Habeas Corpus Act, originally 29-30 Vict. (1866) ch. 45,— "Wood's Act,"—which was taken from the Habeas Corpus Act of 56 Geo. III. ch. 100 (1816), *In re Melina Trepanier* (1885), 12 Can. S.C.R. 111, and *Regina v. Mosier* (1867), 4 Ont. Pr. 64, may be referred to. It has, I think, yet to be decided whether its scope is wider than that of its prototype, which excludes criminal matters and process in civil suits: see per Patteson, J., in *Carus Wilson's Case* (1845), 7 Q.B. 984, 1010. Secs. 5-7 enable the court or judge to direct the issuing of a certiorari as ancillary to the writ of habeas



corpus, whether awarded under that Act or the Act of Charles, or at common law, and sections 6 and 7 confer the right of appeal upon the prisoner if remanded.

The question then is whether any sufficient ground was shewn for discharging the appellant. No fault appears in the commitment or on the face of the conviction, but it is contended that upon the depositions returned with the certiorari there appears no evidence to support the conviction; and, therefore, that the prisoner ought to be discharged as being in illegal custody under an erroneous conviction; since it is only reasonable that a person should not be detained in custody on a conviction which would be quashed if brought upon the court in another form: *Paley on Convictions*, 5th ed., p. 400.

If there was evidence upon which the magistrate might have convicted, he was the judge of the weight to be attached to it, and it is not for us to rehear the case or to sit in appeal from his decision.

It appears that one Macdonald had been charged before the magistrate with being the keeper of the house in question and that she had been convicted. The charge against the appellant then came on to be heard and she and her solicitor, according to the magistrates' return to the certiorari, not unreasonably consented that the evidence given by the witnesses (one of whom was the appellant) on the hearing of the charge against Macdonald, should be read and taken as having been given pro and con on the charge against the appellant herself, if and so far as such consent could warrant the magistrate in acting upon it.

Applying such evidence to the appellant's case so far as it affected her, the magistrate convicted. It is now urged in her behalf (1) that the consent as given could not make the depositions on the Macdonald charge evidence against her, and (2) that even if they were admissible the evidence did not go far enough to prove the charge.

I am of opinion that the consent was effectual to admit the depositions in the Macdonald case as evidence on the charge against the appellant. Under the former convenient

classification of crimes as felonies and misdemeanors, the abolition of which, I think for my own part, is much to be regretted, such a charge was a misdemeanor simply and the competency of the accused or her counsel to make admissions at the trial for the purposes of the trial was undoubted.

In *Rex v. Foster* (1836), 7 C. & P. 495, on an indictment for felony for having in his possession a mould for the purpose of coining, the prisoner was acquitted; a second indictment for a related felony was then presented, the evidence on which was to be the same as in the former case. Counsel for the prosecution said that with the assent of the prisoner's counsel he proposed not to call the witnesses again. Patteson, J., said he doubted if that could be done, even by consent, in a case of felony, though he knew it might be in a case of misdemeanor. The witnesses were, therefore, recalled and resworn, and the evidence they had given read over to them from the judge's notes.

*Regina v. Thornhill* (1838), 8 C. & P. 575, was an indictment for perjury (a misdemeanor it may now be necessary to say). The attorneys agreed upon the trial that the formal proofs on the part of the prosecution should be dispensed with, and that part of the case for prosecution admitted. Counsel having unfortunately not been informed of this arrangement declined to make any admission at the trial. Lord Abinger said: "In a criminal case, tried in the Crown side of the assizes, I cannot allow any admission to be made on the part of the defendant, unless it is made at the trial by the defendant or his counsel."

In Roscoe on Criminal Evidence, 12th ed., p. 120, it is said, citing these cases: "In cases of misdemeanor evidence may be taken by consent."

Mr. Stone argued that in these cases both the indictments were against the same prisoner, but I do not see how that can make any difference in the principle, which is that in cases of misdemeanor admissions may be made, or consent given to admit as evidence what, without such consent, must have been proved in the ordinary way.

Section 690 of the Code now concedes the principle to a limited extent in all cases, providing that any accused person on his trial for any indictable offence, or his counsel or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof. This perhaps hardly goes far enough for the purposes of the present case : see *Regina v. Ray* (1890), 20 Ont. R. 212.

Then, as to whether there is in fact evidence of the charge: Lane, a baker, proved that the appellant was an inmate of the house, and he spoke also of the general reputation of the house as being a house of ill-fame. The chief of police said the house had that reputation, and that when he went to make the arrest he found in the house Macdonald, Margaret Foley, and the appellant; the two former tried to escape. On reading over the warrant, Macdonald said she would be damned if she would go, and also that he, the chief of police, might have given her a chance to get out, to which he replied that he had given her one chance and she did not take it.

One Washburn knew Macdonald and her house and that it was reputed to be a house of ill-fame. Had been looking for such a house, when in Peterborough, and was taken there by two men whom he had asked if they knew such a house. He went in and while there lay with the appellant and paid her \$5.00. Many other witnesses spoke of the house having the reputation of a house of ill-fame, or a bawdy house, or a "fast" house, but they had never known of or seen anything actually wrong or disorderly about it; and there was some evidence of men having been seen going to the house at a late hour of the night on one occasion. There was, in short, no evidence of disorderly conduct, except on the single occasion sworn to by Washburn, but there was a remarkable unanimity in the evidence of the numerous witnesses who spoke of the reputation of the house.

In the face of these depositions, it cannot be said that there was no evidence in support of the charge.

"In some cases the offence consists of a series of transactions as in indictments for barratry and keeping a house of ill-fame;" Roscoe's Criminal Evidence, 11th ed., p. 86.

"It is a cumulative offence. It is not necessary to prove who frequents the house, which in many cases it might be impossible to do, but if unknown persons are proved to have been there conducting themselves in a disorderly manner it will maintain the indictment;" *Ibid*, pp. 773, 774; *J Anson v. Stuart* (1787), 1 T.R. 748, 754.

It is not necessary that the indecency or disorderly conduct should be perceptible from the exterior of the house; *Regina v. Rice* (1866), L.R. 1 C.C.R. 21.

Evidence of the general reputation of the house seems to be admissible or has been held to be so, but I am not prepared to say that such evidence alone would be sufficient to convict. Such a reputation is not acquired without acts or conduct capable of proof from which the character of the house may be inferred, such as the character of the women as being common prostitutes and the fact of men visiting the house, at all hours and dissolute and disorderly behaviour there. As Lord Hardwicke says in *Clarke v. Periam* (1742), 2 Atk. at p. 339, speaking of cases "where the character is the particular issue to be tried: Suppose in the case of an indictment for keeping a common bawdy house, without charging any particular fact, though the charge is general, yet at the trial you may give in evidence particular facts, and the particular time of doing them." That, I think, points to the proper way of proving the charge. Witnesses who speak simply to a general reputation without being able to point to anything particular, may easily attribute the character of a common bawdy house or a house of ill-fame to a house to which, however irregular may be the life of its inmates, the law does not affix that character. In the present case, there was proof of an act of prostitution by one of the inmates of the house which had at that time acquired such a character as to be pointed out to the person who was the other party to the act as being such a house as he was looking for, *i.e.*, a house of ill-fame or bawdy house where women might be found who would prostitute themselves to all comers. The conduct of the women when arrested and what they said were not improper to be considered.

I may refer to the case of *Regina v. McNamara* (1891), 20 Ont. R. 489, where this question was examined. I am not prepared, however, to concur unreservedly in the observations made in the case there cited by my learned brother Rose from Dudley's South Carolina Reports, p. 346.

On the whole I think there was some evidence upon which the magistrate, unless he believed the evidence given by the appellant and her friends, was warranted in convicting, and that being so, we cannot interfere.

*Appeal dismissed.*

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[NEW WESTMINSTER COUNTY COURT, B.C.]

BEFORE HIS HONOR W. NORMAN BOLE, COUNTY JUDGE.

**THE QUEEN v. VACHON.**

*Fishery regulations—Having in possession small sturgeon—  
Unauthorised possession by servant—Liability of master—  
Mens rea—Fisheries' Act, R.S.C. 1886, c. 95, s. 18.*

1. Upon a charge under the Fishery regulations of having in possession sturgeon under the permitted size, the doctrine of *mens rea* applies; and a conviction should not be made against the master in respect of the unauthorized possession by the servant, if there is no knowledge or connivance on the master's part in regard thereto.

DECIDED : July 9, 1900.

Appeal against a summary conviction, whereby the appellant had been fined \$20 and costs, and in default one month's imprisonment, for having, on the 25th May, 1900, at the Windsor Hotel, New Westminster, the young of sturgeon, under four feet, in his possession.

By an Order in Council, passed under the provisions of "The Fisheries Act," R.S.C. 1886, c. 95, on November 21, 1894, regulations were made in respect of the sturgeon fishery in British Columbia, articles 8 and 11 thereof being as follows :

8. Sturgeon under four (4) feet in length shall not be fished for, caught, killed, bought, sold or had in possession by anyone, but if captured in nets or by baited hooks or otherwise, such undersized fish shall be liberated alive immediately thereafter, and if not so liberated the person or persons failing to comply with this regulation shall be liable to the fines and penalties provided by the Fisheries Act.

11. All materials, implements, nets, lines or appliances used, and all fish caught, taken, killed, bought, sold or had in possession, in violation of these regulations, shall be seized and confiscated, and the possessors or the owners thereof shall furthermore be liable to the penalties provided by the Fisheries Act, and any licensee wilfully violating these regulations shall forfeit his license and shall not thereafter be eligible to obtain a sturgeon fishery license.

By section 18 of the Fisheries Act (Can.), everyone who violates any of the regulations under it shall be liable to a penalty not exceeding \$20 and costs, and in default of payment to imprisonment for a term not exceeding one month and not less than 8 days.

NEW WESTMINSTER, B.C., July 9, 1900.

BOLE, Co. J.—

The history of the case, as I gather it from the evidence, is shortly this: On the morning of the 25th of May, the respondent, a fishery officer, found in a safe, adjacent to the kitchen of the Windsor Hotel, of which the appellant is proprietor, two young sturgeon, neither of which was four feet long.

At the time the fish were so found, Vachon was, owing to the death of his brother upon the previous day temporarily absent from the hotel. The fish were very fresh when found, (and had, apparently, been caught that morning) a circumstance which, coupled with Vachon's own evidence, I think justifies me in arriving at that conclusion, which is not seriously denied by the respondent. Furthermore, there was no

evidence offered to show that any servant of Vachon's, on the occasion in question, had charge of the hotel or received possession of the fish, or to show or suggest connivance or wilful blindness on Vachon's part, nor, indeed, that any of Vachon's servants knew that these fish were on the premises.

"It is a general principle of our criminal law that there must be, as an essential ingredient in a criminal offence, some blameworthy condition of mind; sometimes it is negligence, sometimes malice, sometimes guilty knowledge—but as a general rule, there must be something of that kind which is designated by the expression *mens rea*. Moreover, it is a principle of our criminal law that the condition of mind of the servant is not to be imputed to the master. A master is not criminally responsible for a death caused by his servant's negligence, and still less for an offence depending on his servant's malice; nor can a master be held liable for the guilt of his servant in receiving goods, knowing them to have been stolen. And this principle of the common law applies also to statutory offences, with this difference, that it is in the power of the Legislature, if it so pleases, to enact, and in some cases it has enacted, that a man may be convicted and punished for an offence, although there was no blameworthy condition of mind about him; but inasmuch as to do so is contrary to the general principle of the law, it lies on those who assert that the Legislature has so enacted, to make it out convincingly by the language of the statute, for we ought not lightly to presume that the Legislature intended that A should be punished for B." Per Cave J., in *Chisholm v. Doulton* (1889) 22 Q.B.D. at p. 741; approved in *Somerset v. Wade* [1894] 1 Q.B. at page 576. Vide also *Massey v. Morris* [1894] 2 Q.B. 412; *Bank of New South Wales v. Piper* [1897] 66 L.J.P.C. at page 76.

It therefore appears to me that the evidence is not sufficient to sustain the conviction, which must be quashed and the appeal allowed. Each party will bear his own costs.

*Conviction quashed.*

## APPENDIX.

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### CRIMINAL LAW AMENDMENTS, 1900, WITH ANNOTATIONS.

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#### CRIMINAL CODE AMENDMENT ACT, 1900.

(Statutes of Canada, 63 Vict., chapter 46.)

[Assented to July 18, 1900.]

[In force from January 1, 1901.]

**H**ER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

**1. Short title.**—This Act may be cited as *The Criminal Code Amendment Act, 1900.*

**2. Coming into force.**—This Act shall come into force on the first day of January, 1901.

**3. Amendments in schedule.**—*The Criminal Code, 1892*, is amended in the manner set forth in the following schedule:—

#### SCHEDULE.

**Section 3. Interpretation Clause.**—By repealing sub-paragraph (i) of paragraph (e) as that sub-paragraph is enacted by chapter 40 of the statutes of 1895, and substituting the following therefor :—

“(i.) In the Province of Ontario, the Court of Appeal for Ontario.”

And by repealing sub-paragraph (i) of paragraph (y) and substituting the following therefor :—



“(i.) In the Province of Ontario the High Court of Justice for Ontario.”

NOTE.—Sub-paragraph (i) of para. (e) formerly read “any Divisional Court of the High Court of Justice.” (Can. Stat. 1895, c. 40.) By this amendment the Court of Criminal Appeal in Ontario will in future be the Court of Appeal for Ontario instead of a Divisional Court.

The amendment to paragraph (j) which defines the term “superior court of criminal jurisdiction” became necessary because the provision as it formerly stood related to the “Divisions” of the High Court, and under recent legislation the “Divisions” of the High Court have no jurisdiction as such, but as the High Court of Justice for Ontario. R.S.O. 1897, c. 51, s. 41.

By inserting the following section immediately after section 166:—

**“166 A. Permitting escape.**—Every one is guilty of an indictable offence and liable to one year’s imprisonment, who by failing to perform any legal duty, permits a person in his lawful custody on a criminal charge to escape therefrom.”

NOTE.—This clause providing against negligent escape, was contained in the Bill of 1891 (see clause 167), and also in the Bill of 1892 (clause 168), but it was struck out in Committee of the Whole in the House of Commons. The suggestion was that the offence was not essentially a criminal one. Parliament has since decided that the Code should contain such a provision. There was a corresponding provision in the pre-existing law (see Revised Statutes of Canada 1886, chapter 165, section 7). The clause now proposed is taken from the Criminal Code Bill (Imp.) of 1880, clause 136.

Section 179.—By substituting the following therefor:—

**“179. Publishing obscene matter.**—Everyone is guilty of an indictable offence and liable to two years’ imprisonment who knowingly, without lawful justification or excuse—

(a.) manufactures, or sells, or exposes for sale or to public view, or distributes or circulates, or causes to be distributed or circulated any obscene book, or other printed, typewritten or otherwise written matter, or any picture, photograph, model or other object tending to corrupt morals; or

(b.) publicly exhibits any disgusting object or any indecent show; or

(c.) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing of abortion or miscarriage.

2. No one shall be convicted of any offence in this section mentioned if he proves that the public good was served by the acts alleged to have been done and that there was no excess in the acts alleged beyond what the public good requires.

3. It shall be a question for the court or judge whether the occasion of the manufacture, sale, exposing for sale, publishing, or exhibition is such as might be for the public good, and whether there is evidence of excess beyond what the public good requires in the manner, extent or circumstances in, to or under which the manufacture, sale, exposing for sale, publishing or exhibition is made, so as to afford a justification or excuse therefor; but it shall be a question for the jury whether there is or is not such excess.

4. The motives of the manufacturer, seller, exposor, publisher or exhibitor shall in all cases be irrelevant."

NOTE.—The former reading of paragraph (a) was "*publicly* sells or exposes for *public* sale or to public view any obscene book," etc. This amendment omits the word "*publicly*" from before "*sells*," and "*public*" from before "*sale*."

Subsection 3 formerly read "It shall be a question of *law* whether, etc."

The inclusion of the "manufacture" as an offence under the section is new. The distribution or circulation of the obscene print is also made a distinct offence. In paragraph (c) the words "or miscarriage" have been added.

Section 180.—By substituting the following therefor:—

**"180. Posting immoral literature.**—Every one is guilty of an indictable offence and liable to two years' imprisonment who posts for transmission or delivery by or through the post,—

(a.) any obscene or immoral book, pamphlet, newspaper, picture, print, engraving, lithograph, photograph or any pub-

lication, matter or thing of an indecent, immoral, or scurrilous character ; or

(b.) any letter upon the outside or envelope of which, or any post card or post band or wrapper upon which there are words, devices, matters or things of the character aforesaid ; or

(c.) any letter or circular concerning schemes devised or intended to deceive and defraud the public or for the purpose of obtaining money under false pretenses."

NOTE.—Section 180 was adapted from the Post Office Act, R. S. C. 1886, c. 35, s. 103, which section was repealed by the Code (section 981). The Post Office Act contained the words which were not included in section 180 before this amendment, viz. : "seditious, disloyal, scurrilous or libellous." Of these all but "scurrilous" are probably thought to be sufficiently covered elsewhere in the Code. The object of the amendment is to make the sending of scurrilous mail-matter by post an offence as well as the sending of indecent or immoral prints.

Section 183.—By substituting the following therefor:—

"183. **Seduction.**—Every one is guilty of an indictable offence and liable to two years' imprisonment,—

(a.) who, being a guardian, seduces or has illicit connection with his ward ; or

(b.) who seduces or has illicit connection with any woman or girl previously chaste and under the age of twenty-one years who is in his employment in a factory, mill, workshop, shop or store, or who, being in a common, but not necessarily similar, employment with him in such factory, mill, workshop, shop or store, is, in respect of her employment or work in such factory, mill, workshop, shop or store, under or in any way subject to his control or direction, or receives her wages or salary directly or indirectly from him."

NOTE.—This amendment widens the operation of the section to women employed in a shop or store.

No person is to be convicted of an offence under this section upon the evidence of one witness unless such witness "is corroborated in some material particular by evidence implicating the accused." Cr. Code, sec. 684 ; and see *R. v. Wyse* (N.W.T.), 1 Can. Cr. Cas. 6, and *R. v. Vahey* (Ont.), 2 Can. Cr. Cas. 258.

The word "guardian" as used in this section is given a special statutory meaning by sec 186A, *infra*.

By inserting immediately after section 183 the following section :—

**" 183 A. Burden of proof.**—The burden of proof of previous unchastity on the part of the girl or woman under the three next preceding sections shall be upon the accused."

NOTE.—The three sections referred to relate to the following offences :—Seduction of girls under sixteen (s. 181), seduction under promise of marriage (s. 182), and seduction of a ward, or employee (s. 183 as amended in this statute).

By inserting the following section immediately after section 186 :—

**" 186 A. "Guardian."**—The word "guardian" in sections 183 and 186 includes any person who has in law or in fact the custody or control of the girl or child."

NOTE.—Section 183 relates to the seduction of a ward or employee, and sec. 186 to the offence by a parent or guardian of procuring the defilement of the child or ward.

The expression "person" in the definition of guardian here given will include a society or corporation authorized to act in the capacity of guardian or to assume the custody or control of the girl or child. Cr. Code, sec. 3 (4).

Section 187.—By substituting the following therefor :—

**" 187. Householders permitting defilement.**—Every one who, being the owner or occupier of any premises, or having, or acting or assisting in the management or control thereof, induces or knowingly suffers any girl of such age as in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence and—

(a.) is liable to ten years' imprisonment if such girl is under the age of 14 years ; and

(b.) is liable to two years' imprisonment if such girl is of or above the age of 14 and under the age of 18 years."

NOTE.—This amendment places the age limit under paragraph (b) at 18 instead of 16 as it was in the Code of 1892. Another change substitutes the words "owner *or* occupier" for "owner and occupier."

Section 189.—By substituting the following therefor:—

**"189. Carnally knowing idiots.**—Everyone is guilty of an indictable offence and liable to four years' imprisonment who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any female idiot or imbecile, insane or deaf and dumb woman or girl, under circumstances which do not amount to rape but where the offender knew or had good reason to believe, at the time of the offence, that the woman or girl was an idiot, or imbecile, or insane or deaf and dumb."

NOTE.—The words "or had good reason to believe" are new.

The offence dealt with by this section is one of those in which corroborative evidence is required by Code section 684, and a conviction is not justified upon the evidence of one witness "unless such witness is corroborated in some material particular by evidence implicating the accused." Cr. Code 684; *R. v. Wyse* (N.W.T.), 1 Can. Cr. Cas. 6, and *R. v. Vahey* (Ont.), 2 Can. Cr. Cas. 258.

Section 205. **Lotteries.**—By substituting for subsection six thereof the following :—

"6. This section does not apply to—

(a.) the division by lot or chance of any property by joint tenants or tenants in common, or persons having joint interests (*droits indivis*) in any such property; or

(b.) raffles for prizes of small value at any bazaar held for any charitable or religious object, if permission to hold the same has been obtained from the city or other municipal council, or from the mayor, reeve or other chief officer of the city, town or other municipality, wherein such bazaar is held and the articles, raffled for thereat, have first been offered for sale and none of them are of a value exceeding fifty dollars; or

(c.) the *Crédit Foncier du Bas-Canada*, or the *Crédit Foncier Franco-Canadien*."

NOTE.—The present paragraph 6 (c) is identical with the former paragraph 6 (d), and the exception from the lottery clause which was formerly embodied in paragraph 6 (c) is eliminated. By it certain distributions of paintings and works of art by lot among the members or ticket holders of any incorporated society established for the encouragement of art, were specially excepted from the operation of sec. 205. It was, however, found that several so called art societies were to all intents and purposes lotteries for money prizes and that they directly or indirectly gave ticket holders an option to take money. In order to eradicate this evil, which became a serious one in the City of Montreal, it was decided to prohibit art lotteries as well as others, and the exception was therefore struck out.

Paragraph 6 (d) was formerly limited to bazaars held for any *charitable* object, and this has been extended to bazaars held for any religious object.

**Section 207. Vagrancy.**—By substituting the following for paragraph (a.) of subsection one thereof:—

(a.) Not having any visible means of subsistence, is found wandering abroad or lodging in any barn or outhouse, or in any deserted or unoccupied building, or in any cart or wagon, or in any railway carriage or freight car, or in any railway building, and not giving a good account of himself, or who, not having any visible means of maintaining himself, lives without employment."

**Section 208. Vagrancy.**—(as amended by chapter 57 of the statutes of 1894.)—By adding at the end thereof the following proviso:—

"Provided that no aged or infirm person shall be convicted as a loose, idle or disorderly person or vagrant for any reason coming within paragraph (a) of section 207, in the county of which he has for the two years immediately preceding been a resident."

**Section 210. Duty to provide necessaries.**—By adding thereto the following subsection :

"3. In this section the word "guardian" has the same meaning as, under section 186 A, it has in sections 183 and 186."

Section 264.—By substituting the following therefor:—

**"264. Kidnapping.**—Everyone is guilty of an indictable offence and liable to seven years' imprisonment who, without lawful authority—

(a.) Kidnaps any other person with intent—

(i.) to cause such other person to be secretly confined or imprisoned in Canada against his will ; or

(ii.) to cause such other person to be unlawfully sent or transported out of Canada against his will ; or

(iii.) to cause such other person to be sold or captured as a slave, or in any way held to service against his will ; or

(b.) Forcibly seizes and confines or imprisons any other person within Canada.

2. Upon the trial of any offence under this section the non-resistance of a person so unlawfully kidnapped or confined shall not be a defence unless it appears that it was not caused by threats, duress or force, or exhibition of force."

NOTE.—Under the section as it formerly stood, the unlawful and forcible seizure or imprisonment of a person was punishable only where made with the like intent as in the cases of kidnapping provided for in paragraph (a).

Section 278.—By repealing this section and substituting the following :—

**"278. Polygamy.**—Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars,

(a.) who practises, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in

a manner recognized by law as a binding form of marriage or not, agrees or consents to practice or enter into

- (i.) any form of polygamy;
- (ii.) any kind of conjugal union with more than one person at the same time ; or
- (iii.) what among the persons commonly called Mormons is known as spiritual or plural marriage ; or
- (b.) who lives, cohabits, or agrees or consents to live or cohabit in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union ; or
- (c.) celebrates, is a party to, or assists in any such rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraph (a) of this section ; or
- (d.) procures, enforces, enables, is a party to, or assists in the compliance with, or carrying out of, any such form, rule or custom which so purports ; or
- (e.) procures, enforces, enables, is a party to, or assists in the execution of, any such form of contract which so purports, or the giving of any such consent which so purports."

NOTE.—This amendment corrects a clerical error, the present paragraph (b) having previously stood as sub-paragraph (iv) of paragraph (a).

Section 284.—By substituting the following therefor:—

**"284. Stealing children.**—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to deprive any parent or guardian of any child under the age of fourteen years, of the possession of such child, or with intent to steal any article about or on the person of such child, unlawfully—

- (a.) takes or entices away or detains any such child ; or
- (b.) receives or harbours any such child knowing it to have been dealt with as aforesaid.



2. Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child.

3. In this section the word "guardian" has the same meaning as it has in sections 183 and 186, as interpreted by section 186A."

Section 285.—By substituting the following for subsection 1 thereof :—

**"285. Defamatory libel.**—A defamatory libel is matter published, without legal justification or excuse, likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or designed to insult the person of or concerning whom it is published."

NOTE.—This first subsection formerly concluded with the words "designed to insult the person to whom it is published." The amendment substitutes the words "of or concerning" for the word "to."

The second subsection of section 285 remains as heretofore and is as follows :—

"(2) Such matter may be expressed either in words legibly marked upon any substance whatever or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony."

Section 306.—By substituting the following therefor :—

**"306. Theft of things under seizure.**—Every one commits theft and steals the thing taken or carried away who, whether pretending to be the owner or not, secretly or openly, takes or carries away, or causes to be taken or carried away, without lawful authority, any property under lawful seizure and detention by any peace officer or public officer in his official capacity."

NOTE.—The section formerly stopped at the word "detention." This amendment adds the words "by any peace officer or public officer in his official capacity."

It was said that the section had been taken advantage of to try private rights at the expense of the Crown, and to brand as a criminal a party to a mere civil dispute arising out of a more or less doubtful question of law or fact. It had been decided in *R. v. Hollings-*

*worth* (N.W.T.), 2 Can. Cr. Cas. 291, that a guest at a hotel, who, without leave, removed his baggage after the same had been placed under "lawful seizure and detention" by the hotelkeeper in respect of the latter's common law lien, was punishable under section 306 of the Code, although the guest was permitted to have access to the room where the baggage was kept. The amendment now made excludes such cases from the operation of this section."

By inserting the following section immediately after section 331 :—

**"331A. Cattle frauds.**—Every one is guilty of an indictable offence and liable to three years' imprisonment who —

(a.) without the consent of the owner thereof,

(i.) fraudulently takes, holds, keeps in his possession, conceals, receives, appropriates, purchases or sells, or fraudulently causes or procures, or assists in taking possession of, concealing, appropriating, purchasing or selling any cattle which are found astray ; or

(ii.) fraudulently, wholly or partially obliterates, or alters or defaces, or causes or procures to be obliterated, altered or defaced, any brand mark, or vent brand on any such cattle, or makes or causes or procures to be made any false or counterfeit brand, mark or vent brand on any such cattle ; or

(b.) without reasonable cause refuses to deliver up any such cattle to the proper owner thereof or to the person in charge thereof on behalf of such owner, or authorized by such owner to receive such cattle."

See section 707A, *post*.

Section 332.—By substituting the following therefor :—

**"332. Stealing domestic animals.**—Every one who steals any dog, or any bird, beast or other animal ordinarily kept in a state of confinement or for any domestic purpose, or for any lawful purpose of profit or advantage, is, if the value of the property stolen exceeds twenty dollars, guilty of an indictable offence and liable to a penalty not exceeding fifty dollars

over and above the value of the property stolen, or to two years' imprisonment, or to both, and if the value of the property stolen does not exceed twenty dollars, is guilty of an offence and liable upon summary conviction to a penalty not exceeding twenty dollars over and above such value, or to one month's imprisonment with hard labour.

2. Every one who, having been previously convicted of an offence under this section, is summarily convicted of another offence thereunder, is liable to three months' imprisonment with hard labour."

Section 410.—By substituting the following therefor:—

**"410. Burglary.**—Every one is guilty of an indictable offence called burglary, and liable to imprisonment for life, who

(a.) breaks and enters a dwelling-house by night with intent to commit any indictable offence therein; or

(b.) breaks out of any dwelling-house by night, either after committing an indictable offence therein, or after having entered such dwelling-house, either by day or by night, with intent to commit an indictable offence therein.

2. Every one convicted of an offence under this section who when arrested, or when he committed such offence, had upon his person any offensive weapon, shall, in addition to the imprisonment above prescribed, be liable to be whipped."

NOTE.—The only change is in the addition of subsection two.

It had been represented to the Department of Justice that crimes of this nature have been alarmingly frequent of late, and that in many cases they are committed by professional tramps, which class is year by year becoming a greater menace to the peace and safety of residents of small towns and of villages and rural districts. The added punishment of whipping was thought to be the most effective preventive, as imprisonment alone has not sufficient terrors for the class referred to. The Code already provides the punishment of whipping for the crime of robbery with violence. See Section 398.

Section 449.—By substituting the following therefor:—

**"449. Trade mark offences.**—Every one is guilty of an indictable offence who —

(a.) without the consent of such other person wilfully defaces, conceals or removes the duly registered trade mark or name of another person upon any cask, keg, bottle, siphon, vessel, can, case or other package, with intent to defraud such other person, or unless such package has been purchased from such other person ;

(b.) being a manufacturer, dealer or trader, or a bottler, without the written consent of such other person, trades or traffics in any bottle or siphon which has upon it the duly registered trade mark or name of another person, or fills such bottle or siphon with any beverage for the purpose of sale or traffic.

2. The using by any manufacturer, dealer or trader other than such other person of any bottle or siphon for the sale therein of any beverage, or the having upon it such trade mark or the name of another person, buying, selling or trafficking in any such bottle or siphon without such written permission of such other person, or the fact that any junk-dealer has in his possession any such bottle or siphon having upon it such a trade mark or name without such written permission, shall be *prima facie* evidence that such use, buying, selling or trafficking or possession is unlawful within the meaning of this section."

NOTE.—The former section which this replaces applied to bottles only and the trade mark had to be one which was "blown or stamped or otherwise permanently affixed thereon." This substituted section was introduced by Mr. B. Russell, Q. C., M. P., of Halifax. It is designed to protect manufacturers and bottlers whose business is now injured by the action of unscrupulous persons, who procure bottles from second-hand dealers, junk stores, etc., and fill them with inferior soda water, ginger ale, etc., and by merely covering up the manufacturer's name on the bottle, and covering up his trade mark, sell the inferior ginger ale, etc.; and although it is impossible to show that there is any fraudulent representation or deception practiced on the public in the first instance (as the name and trade mark are covered up), still the use of the bottles in this way eventually injures the manufacturer, as the new cover sometimes slips off and his reputation becomes injured in some cases thereby. Commons Sessional Debates, 1900, page 5290.

On the consideration of the amendment in the Senate the Hon. Mr. Power said :—"The necessity for this provision has arisen from the

practice of persons who make up certain kinds of mineral and other waters using the siphons and bottles bearing the trade mark of the person who has manufactured that which was in the bottle first, and it is really a sort of forgery. If one wishes to use a bottle which has contained ——'s ale, he can wipe the label off, but this is intended to meet the cases of bottles and siphons which have the original maker's name stamped on the bottle or siphon, and one can readily understand how fraud is perpetrated by selling an inferior article with one of these trade marks on it." Senate Debates 1900, page 710.

It will be observed that under this enactment the trade mark is protected only when it has been "duly registered," *i.e.* registered in Canada under the Canadian Trade Mark Act. The words "or unless such package has been purchased from such other person," which appear at the end of sub-paragraph (a), are probably intended to except from its operation all cases in which the trade mark proprietor has parted with his right of property in the "cask, keg, bottle, etc., or other package."

Sub-paragraph (b) and subsection (2) are limited to bottles and siphons and do not include casks, kegs and cases, and packages of that class, as does sub-paragraph (a). The offences under sub-paragraph (b) consist either in

(1) trading or trafficking in the bottles and siphons, or

(2) filling the bottles and siphons for the purpose of sale or traffic.

The mere "having in possession" is not made an indictable offence and it therefore seems doubtful whether that part of the second subsection which enacts that the fact that a junk dealer "has in his possession any such bottle or siphon" shall be *prima facie* evidence that "such possession is unlawful within the meaning of this section" can have any operative force.

Section 479.—By substituting the following therefor:—

"479. Counterfeit token. — In this Part the expression "counterfeit token of value" means any spurious or counterfeit coin, paper money, inland revenue stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation the same may be described, and includes also any coin or paper money, which, although genuine, has no value as money, but in the case of such last mentioned coin or paper money it is necessary in order to constitute an offence under this Part that there should be knowledge on the part of the person charged that such coin or paper money was

of no value as money, and a fraudulent intent on his part in his dealings with or with respect to the same."

NOTE.—The section formerly ended at the words "deceptive designation the same may be described." The amendment consists in the addition of the words which follow them, and is particularly directed against frauds in passing bills of defunct banks and notes of the "Confederate States" of America.

Section 520.—By substituting the following therefor:—

"**520. Trade combines.**—Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company—

(a.) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

(b.) to restrain or injure trade or commerce in relation to any such article or commodity; or

(c.) to unduly prevent, limit or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

(d.) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees."

NOTE.—Section 520 originally contained the word "unlawfully" before the subsections (a) to (d) inclusive and the word "unduly" appeared in paragraphs (a), (c) and (d) as it does in this amendment, and the word "unreasonably" before the word "enhance" in paragraph (c). The section was amended in 1899 (Canada Statutes 1899, c. 46, s.

1) by striking out the words "unduly" and "unreasonably," but the word "unlawfully" which applied to all of the paragraphs was retained. 2 Can. Cr. Cas. 605 (Appendix). The present amendment re-inserts the words "unduly" and "unreasonably" in their former position, but strikes out the word "unlawfully."

Subsection 2 is new. It applies not only to regularly organized trade unions as that term is defined by the Trade Union Act, R.S.C. c. 131, but to any voluntary organization of labourers. Senate Debates, 1900, page 1044. As to trade unions there is a provision in that statute as follows:—

(Section 22). "The purposes of any trade union shall not by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise, or so as to render void or voidable any agreement or trust."

**Section 533. Rules of criminal procedure.**—By adding thereto the following subsection:—

"3. In the Province of Ontario the authority for the making of such rules of court applicable to superior courts of criminal jurisdiction in the province is vested in the Supreme Court of Judicature, and such rules may be made by the said court at any time with the concurrence of a majority of the judges thereof present at a meeting held for the purpose."

**Section 540. Sessions not to try certain offences.**—By adding to the section, as amended by section 1 of chapter 57 of the statutes of 1894, the following:—

"Or any indictment for bribery or undue influence, personation or other corrupt practice under *The Dominion Elections Act*."

NOTE.—The 540th section provides that the Courts of General or Quarter Sessions shall not have jurisdiction in certain cases which are specified, but did not formerly specify these offences against the Election law. The Dominion Elections Act, however, declares that these offences shall not be tried in courts of General or Quarter Sessions, and this amendment is for the purpose of making the Code correspond.

By adding immediately after Section 550 the following section:—

**“550A. Excluding public from court room.**—At the trial of any person charged with an offence under any of the following sections, that is to say, 174, 175, 176, 177, 178, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 195, 198, 208 in so far as it relates to paragraphs (*i*), (*j*) and (*k*) of 207, 259, 260, 267, 268, 269, 270, 271, 272, 273, 274, 281, and 282, or with conspiracy or attempt to commit, or being an accessory after the fact to any such offence, the court or judge may order that the public be excluded from the room or place in which the court is held during such trial; and such order may be made in any other case also in which the court or judge or justice may be of opinion that the same will be in the interests of public morals.

2. Nothing in this section shall be construed by implication or otherwise as limiting any power heretofore possessed at common law by the presiding judge or other presiding officer of any court of excluding the general public from the court-room in any case when such judge or officer deems such exclusion necessary or expedient.”

NOTE.—Section 174, Unnatural offence; 175, Attempt to commit sodomy; 176, Incest; 177, Indecent acts; 178, Acts of gross indecency; 181, Seduction of girls under 16; 182, Seduction under promise of marriage; 183, Seduction of ward, servant, etc.; 184, Seduction of passengers on vessels; 185, Procuring; 186, Parent or guardian procuring; 187, Householders permitting defilement on premises; 188, Conspiracy to defile; 189, Carnally knowing idiots, etc.; 190, Prostitution of Indian women; 195 to 198, Keeping disorderly house; 207, (*i*), (*j*) and (*k*) Being common prostitute; keeping house of ill-fame; frequenting such house; 259, Indecent assault on females; 260, Indecent assault on males; 267, Rape; 268, Attempt to commit rape; 269, Defiling children under 14; 270, Attempting to defile child; 271, Killing unborn child; 272, Procuring abortion; 273, Woman procuring her own miscarriage; 274, Supplying noxious drugs, etc.; 281, Abduction of woman; 282, Abduction of heiress,

The Solicitor General (Hon. Mr. Fitzpatrick) made the following statement with regard to the object of this section, when it came up for discussion in the Commons:—“Under the general law, the courts are open to the general public, but by section 550 the trials of all persons under the age of sixteen years shall, as far as practicable, take place without publicity. Our intention is to extend substantially the provisions of section 550 to the cases provided for in 550A. In the trial of charges for indecent offences and things of that kind, we leave it discretionary



with the judge to declare that for the purpose of such trials the court shall not be a public court, and that he shall have power to determine who shall have access." Commons Sessional Debates 1900, page 5266.

**Section 553. Jurisdiction of magistrate.**—By substituting the following for paragraph (a.) thereof :—

"(a.) Where the offence is committed in or upon any water, tidal, or other, or upon any bridge, between two or more magisterial jurisdictions, such offence may be considered as having been committed in either of such jurisdictions."

NOTE.—Sec. 553 deals with the jurisdiction of justices of the peace, and the amendment consists in the insertion of the words "or upon any bridge" where they now appear, and of the change of the phrase "in any water" to "in or upon any water."

**Section 589.**—By substituting the following therefor:—

"589. **Breach of recognizance on remand.**—If the accused person does not afterwards appear at the time and place mentioned in the recognizance the said justice, or any other justice who is then and there present, having certified upon the back of the recognizance the non-appearance of such accused person, in the form R in schedule one hereto, may transmit the recognizance to the proper officer appointed by law, to be proceeded upon in like manner as other recognizances; and such certificate shall be *prima facie* evidence of the non-appearance of the accused person.

"2. The proper officer to whom the recognizance and certificate of default are to be transmitted in the Province of Ontario, shall be the clerk of the peace of the county for which such justice is acting; and the Court of General Sessions of the Peace for such county shall, at its then next sitting, order all such recognizances to be forfeited and estreated, and the same shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such court. In the province of British Columbia, such proper officer shall be the clerk of the County Court having jurisdiction at the place where such recognizance is taken, and such

recognizance shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such County Court; and in the other provinces of Canada such proper officer shall be the officer to whom like recognizances have been heretofore accustomed to be transmitted under the law in force before the passing of this Act, and such recognizances shall be enforced and collected in the same manner as like recognizances have heretofore been enforced and collected."

NOTE.—Subsection 2 is new. The change adopts the practice under the Summary Convictions clauses of the Code. See Code sec. 878, as amended in 1895.

**Section 601. Granting bail.**—By adding thereto the following subsection :—

"3. Where the offence is one triable by the Court of General or Quarter Sessions of the Peace and the justice is of opinion that it may better or more conveniently be so tried, the condition of the recognizance may be for the appearance of the accused at the next sittings of that court notwithstanding that a sittings of a superior court of criminal jurisdiction capable of trying the offence intervenes."

NOTE.—It was doubtful whether this could formerly be done, and as a consequence petty cases were frequently sent to the Assizes which might very well be tried by the Sessions.

**Section 641.**—By substituting the following therefor:—

**"641. Who may prefer an indictment.**—Any one who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor is so bound over, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice. The accused may at any time before he is given in charge to the jury apply to the court to quash any count in the indictment on the ground that it is not founded on such facts or evidence, and the court shall quash such

count if satisfied that it is not so founded. And if at any time during the trial it appears to the court that any count is not so founded, and that injustice has been or is likely to be done to the accused in consequence of such count remaining in the indictment, the court may then quash such count and discharge the jury from finding any verdict upon it.

2. The counsel acting on behalf of the Crown at any court of criminal jurisdiction may prefer against any person who has been committed for trial at such court a bill of indictment for the charge on which the accused has been so committed or for any charge founded on the facts or evidence disclosed in the depositions taken before the justice.

3. The Attorney General or any one by his direction or any one with the written consent of a judge of any court of criminal jurisdiction or of the Attorney General, may prefer a bill of indictment for any offence before the grand jury of any court specified in such consent; and any person may prefer any bill of indictment before any court of criminal jurisdiction by order of such court.

4. It shall not be necessary to state such consent or order in the indictment. An objection to an indictment for want of such consent or order must be taken by motion to quash the indictment before the accused person is given in charge.

5. Save as aforesaid no bill of indictment shall after the commencement of this Act be preferred in any province of Canada."

NOTE.—The only amendment consists in the insertion of subsection

2. The subsequent subsections are renumbered to accord with this change.

This amendment was suggested by B. M. Britton, Esq., Q.C., M.P., who pointed out that under the strict interpretation of the former law there was no power for the prosecutor to lay an indictment except by the written consent of a judge, unless he had taken the precaution at the preliminary investigation of being bound over to prosecute, and that in the majority of cases the prosecutor was not asked by the magistrate to submit himself to be bound over. Commons Debates 1900, page 5269.

By inserting immediately after section 678 the following section :—

**“678A. Warrant for material witness.**— Either before or during the sittings of any court of criminal jurisdiction, the court, or any judge thereof, or any judge of any superior or county court, if satisfied by evidence upon oath that any person within the province likely to give material evidence, either for the prosecution or for the accused, will not attend to give evidence at such sittings without being compelled so to do, may by his warrant cause such witness to be apprehended and forthwith brought before such court or judge, and such witness may be detained on such warrant before such court or judge or in the common jail with a view to secure his presence as a witness, or, in the discretion of the court or judge, may be released on a recognizance, with or without sureties, conditioned for his appearance to give evidence.”

NOTE.—Intended to meet the case of absconding witnesses. Section 583 provides a similar means of securing the attendance of a witness upon a preliminary investigation, but there was no corresponding provision as to witnesses required at the sessions or assizes. An unwilling witness served with a subpoena might abscond, and there was formerly no way of enforcing his attendance until the trial upon proof of default (section 678). See also sec. 679 as amended by the next clause.

**Section 679. Witness in another province.**— By adding thereto the following subsection :—

“ 2. The courts of the various provinces and the judges of the said courts respectively shall be auxiliary to one another for the purposes of this Act; and any judgment, decree or order made by the court issuing such writ of subpoena upon any proceeding against any witness for contempt or otherwise may be enforced or acted upon by any court in the province in which such witness resides in the same manner and as validly and effectually as if such judgment, order or decree had been made by such last mentioned court.”

NOTE.—Section 679 makes provision for issuing a subpoena to a person in another province than that to which the court issuing the subpoena belongs. There is provision in that section that the court

*issuing* the subpoena may take proceedings for contempt or otherwise against any person who may disobey such subpoena. It was found, however, that it would be extremely difficult, if not impossible, for a court in one province to enforce in another province such proceedings for contempt, and it is sought by this amendment to get over the difficulty. A portion of the new subsection is modelled from sec. 84 of the Winding Up Act, R.S.C. 1886, c. 129.

Section 680.—By substituting the following therefor:—

**"680. Bringing up a prisoner as witness.**—When the attendance of any person confined in any prison in Canada, or upon the limits of any jail, is required in any court of criminal jurisdiction in any case cognizable therein by indictment, the court before whom such prisoner is required to attend may, or any judge of such court or of any superior court or county court, or any chairman of General Sessions, may, before or during any such term or sittings at which the attendance of such person is required, make an order upon the warden or jailer of the prison, or upon the sheriff or other person having the custody of such prisoner,—

(a.) to deliver such prisoner to the person named in such order to receive him; and such person named shall, at the time prescribed in such order, convey such prisoner to the place at which such person is required to attend, there to receive and obey such further order as to the said court seems meet; or

(b.) to himself convey such prisoner to such place, there to receive and obey such further order as to the said court seems meet; and in such latter case, on being served with the order and being paid or tendered his reasonable charges, such warden, jailer, sheriff or other person shall convey the prisoner to such place and produce him there according to the exigency of the order."

NOTE.—The only change is in the insertion of the words "or any chairman of General Sessions," and the addition of paragraph (b). See Impl. Act, 16 & 17 Vict., ch. 30; Taylor on Evidence, 9th Ed., ss. 127 ~~5~~. 1276.

Paragraph (b) was suggested by the late Chief Justice Davie of British Columbia, and is intended to effect a considerable saving of expense, especially in that province.

Section 683. **Evidence under commission.**— By adding thereto the following subsection :—

“3. Subject to such rules of court or to such practice or procedure as aforesaid, such depositions by the direction of the presiding judge may be read in evidence before the grand jury.”

NOTE.—The words “by direction of the presiding judge” were inserted in order to impose upon the judge the duty of seeing that the commission had been regularly taken, before directing that the deposition should be used. Commons Debates 1900, page 6321.

Section 687.—By substituting the following therefor:—

“687. **Depositions as evidence.**— If upon the trial of an accused person such facts are proved upon the oath or affirmation of any credible witness that it can be reasonably inferred therefrom that any person whose deposition has been theretofore taken in the investigation of the charge against such person is dead, or so ill as not to be able to travel, or is absent from Canada, and if it is proved that such deposition was taken in the presence of the person accused, and that his counsel or solicitor had a full opportunity of cross-examining the witness, then if the deposition purports to be signed by the judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution without further proof thereof, unless it is proved that such deposition was not in fact signed by the judge or justice purporting to have signed the same.

(2) In this section the word “deposition” includes the evidence of a witness given at any former trial upon the same charge.”

NOTE.—The section as it formerly stood provided that the deposition might be used if it were proved that it was taken in the presence of the person accused “and that *he*, his counsel or solicitor, had a full opportunity of cross examining,” etc. The word “*he*” is now left out. In the debate upon this amendment the Hon. David Mills, Minister of Justice, said :— “It sometimes happens that an ill-informed man is without counsel before a magistrate, and evidence is taken and he is incapable of cross-examining the party. He is unrepresented by counsel. The witness who appeared before him may have left the

country before the trial and may not be present at the trial. The evidence is frequently not well taken, and it may be very different from what it would have been if the witness had been cross-examined. It is, nevertheless, used against him without any opportunity of bringing out those facts which might have completely altered the complexion of the evidence had he been subjected to cross-examination; so where there is no cross-examination I think it is better that the evidence should not be produced." Senate Debates 1899, page 554.

Subsection 2 is new. Under the former section 687 it was doubtful whether depositions taken at a former trial could be used at a second trial necessitated by a disagreement of the jury at the first trial or directed on a case reserved, although the witness had died or left the country meanwhile. 35 Canada Law Journal (1899), pages 91 and 212.

By inserting the following section immediately after section 701 :—

**"701A. Proving age of juvenile.**—In order to prove the age of a boy, girl, child or young person for the purposes of sections 181, 186, 210, 211, 216, 261, 269, 270, 283, 284 and 934A, the following shall be sufficient *prima facie* evidence:—

(a.) Any entry or record by an incorporated society or its officers having had the control or care of the boy, girl, child or young person at or about the time of the boy, girl, child or young person being brought to Canada, if such entry or record has been made before the alleged offence was committed.

(b.) In the absence of other evidence, or by way of corroboration of other evidence, the judge or, in cases where an offender is tried with a jury, the jury before whom an indictment for the offence is tried, or the justice before whom a preliminary inquiry thereinto is held, may infer the age from the appearance of the boy, girl, child or young person."

NOTE.—This amendment is intended to facilitate proof of age particularly in the cases of children coming from abroad in charge of charitable institutions, for registers or other proof of date of birth are not usually available in such cases.

Section 702.—By substituting the following therefor:—

**"702. Evidence of common gaming house.**—When any cards, dice, balls, counters, tables or other instruments of

gaming used in playing any unlawful game are found in any house, room or place suspected to be used as a common gaming house, and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be *prima facie* evidence, on the trial of a prosecution under section 198 or section 199, that such house, room or place is used as a common gaming house, and that the persons found in the room or place where such tables or instruments of gaming are found were playing therein although no play was actually going on in the presence of the officer entering the same under such warrant or order, or in the presence of those persons by whom he is accompanied as aforesaid."

NOTE.—The only material change is the insertion after the words "section 198" of the words "or section 199." This is to make a certain class of evidence sufficient on the trial of a prosecution under section 199 as it already was on the trial of a prosecution under section 198.

Section 703.—By substituting the following therefor:—

"**703. Evidence of unlawful gaming.**—In any prosecution under section 198 for keeping a common gaming house, or under section 199 for playing or looking on while any other person is playing in a common gaming house, it shall be *prima facie* evidence that a house, room or place is used as a common gaming house, and that the persons found therein were unlawfully playing therein—

(a.) if any constable or officer authorized to enter any house, room or place, is wilfully prevented from, or obstructed or delayed in entering the same or any part thereof; or

(b.) if any such house, room or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing or destroying any instruments of gaming."

By inserting immediately after section 707 the following section:—

NOTE.—The object of this amendment is the same as that of the amendment of 702, *supra*. The only change is that the provision is made applicable to section 199 as well as to section 198.



**"707A. Cattle brands as evidence.**— In any prosecution, proceeding or trial for any offence under section 331A, a brand or mark, duly recorded or registered under the provisions of any Act, ordinance or law, on any cattle, shall be *prima facie* evidence that such cattle are the property of the registered owner of such brand or mark, and possession by the person charged, or by others in his employ or on his behalf, of any such cattle marked with such a brand or mark of which he is not himself the registered owner, shall throw upon the accused the burden of proving that such cattle came lawfully into his possession or into the possession of such others in his employ or on his behalf, unless it appears that such possession by others in his employ or on his behalf was without his knowledge and without his authority, sanction or approval."

NOTE.—See section 331A, added to the Code by this Act.

Section 729.—By substituting the following therefor :—

**"729. Verdict, &c., on holiday.**—The taking of the verdict of the jury or other proceeding of the court shall not be invalid by reason of its happening on Sunday or on any other holiday."

NOTE. The amendment is in the addition of the words "or any other holiday" at the end of the section. It is intended to remove doubt as to the validity of proceedings in jury cases, the trial of which continues until after midnight of a day preceding a statutory holiday.

In Manitoba it has been held that sec. 729 applies only to matters before a jury and not to a preliminary enquiry before a magistrate. *R. v. Cavalier* (1896), 1 Can. Cr. Cas. 134. In Ontario it was held that a preliminary inquiry held by a magistrate and a commitment made thereon on a statutory holiday were invalid. *R. v. Murray* (1897), 1 Can. Cr. Cas. 452.

Section 744.—By repealing subsections 1 and 2 thereof and substituting the following:—

**"744. Appeals.**— If the court refuses to reserve the question the party applying may move the Court of Appeal as hereinafter provided.

2. The Attorney General or party so applying may on notice of motion to be given to the accused or prosecutor, as

the case may be, move the Court of Appeal for leave to appeal. The Court of Appeal may upon the motion and upon considering such evidence (if any) as they think fit to receive, grant or refuse such leave."

NOTE.—Under the former law an application had first to be made to the provincial Attorney General for his consent to apply to the court of appeal. The second step, if the Attorney General granted leave to apply, was an application to the court for the leave to appeal; and lastly the appeal itself was argued before the court in cases in which the court granted the leave. This amendment does away with the first application. It was suggested as a reason for this being done that, in some cases at least, the Attorney General of a province was averse to giving his consent to appeal on account of a desire to avoid having the view of the law which he had upheld for the prosecution declared to be erroneous, and reversed on appeal. Another difficulty was the fact that in many instances the Attorney General depends on the local County Crown Attorney for any information in the case not apparent on the record, and the fate of the application might be practically dependent upon the report of the local Crown prosecutor.

Section 760.—By substituting the following therefor:—

**"760. Procedure in Nova Scotia.**—In the province of Nova Scotia a calendar of the criminal cases shall be sent by the Clerk of the Crown to the grand jury in each term, together with the depositions taken in each case and the names of the different witnesses."

NOTE. — This section applies only to Nova Scotia. The amendment consists in striking out the last two lines of the section which read thus: "And the indictment shall not be made out, except in Halifax, until the grand jury so directs." The distinction thus made between Halifax and the country was found to be very inconvenient in practice. The decision of the Supreme Court of Nova Scotia in *R. v. Townsend*, 3 Can. Cr. Cas., 29, as to the validity of an indictment in Nova Scotia without the words "true bill" being endorsed by the foreman of the grand jury, must now be viewed in the light of this amendment.

Section 763. "**County attorney,**" meaning of. —By inserting after the word "includes" in the second line of paragraph (b) thereof, the following words:—"In the province of Ontario the County Crown Attorney."

Section 765.—By substituting the following therefor:—

**"765. County Judge's Criminal Court.**—Every person committed to jail for trial on a charge of being guilty of any of the offences which are mentioned in section 539 as being within the jurisdiction of the General or Quarter Sessions of the Peace, may, with his own consent (of which consent an entry shall then be made of record), and subject to the provisions herein, be tried in any province under the following provisions out of sessions and out of the regular term or sittings of the court, whether the court before which, but for such consent, the said person would be triable for the offence charged, or the grand jury thereof, is or is not then in session, and if such person is convicted, he may be sentenced by the judge.

2. A person who has been bound over by a justice under the provisions of section 601 and has either been unable to find bail or been surrendered by his sureties, and is in custody on such a charge, or who is otherwise in custody awaiting trial on such a charge, shall be deemed to be committed for trial within the meaning of this section."

NOTE.—The amendment is in the addition of the second subsection. The Supreme Court of Nova Scotia had held that the former section only applied where the person was actually and formally "committed for trial," and not to the other cases to which it is now extended. *R. v. James Gibson*, 3 Can. Cr. Cas. 451, and *R. v. Smith*, 3 Can. Cr. Cas. 467.

Section 766. **Sheriff's notice after prisoner's commitment.**—By adding thereto the following subsection:—

"2. Where the judge does not reside in the county in which the prisoner is committed, the notification required by this section may be given to the prosecuting officer, instead of to the judge, and the prosecuting officer shall in such case, with as little delay as possible, cause the prisoner to be brought before him."

NOTE.—This is to remedy an inconvenience which exists particularly in the maritime provinces, where a judge's jurisdiction extends sometimes over three or four counties. Under the section as it formerly was, it was necessary for the judge to receive notice for the purpose of

going to where the prisoner was, to call the prisoner before him to make his election, and he was obliged to go back on another day for the purpose of holding the trial.

By the amendment it is provided that in such cases notice shall be given to the prosecuting officer. He will then notify the judge, and the judge will come on the day fixed for the trial, so that he will not be obliged to make two trips for the purpose of holding the trial.

Section 767.—By substituting the following therefor:—

**“767. Arraignment before County Judge.**—The judge or such prosecuting officer upon having obtained the depositions on which the prisoner was so committed, shall state to him,—

(a) that he is charged with the offence, describing it ;

(b) that he has the option to be forthwith tried before a judge without the intervention of a jury, or to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction.

2. If the prisoner has been brought before the prosecuting officer, and consents to be tried by the judge, without a jury, such prosecuting officer shall forthwith inform the judge, and the judge shall thereupon fix an early day for the trial and communicate the same to the prosecuting officer ; and in such case the trial shall proceed in the manner provided by subsection 3.

3. If the prisoner has been brought before the judge and consents to be tried by him without a jury, the prosecuting officer shall prefer the charge against him for which he has been committed for trial, and if, upon being arraigned upon the charge, the prisoner pleads guilty, the prosecuting officer shall draw up a record as nearly as may be in one of the forms MM or NN in schedule one, such plea shall be entered on the record, and the judge shall pass the sentence of the law on such prisoner, which shall have the same force and effect as if passed by any court having jurisdiction to try the offence in the ordinary way.

4. If the prisoner demands a trial by jury, he shall be remanded to jail.

5. Any prisoner who has elected to be tried by jury, may, notwithstanding such election, at any time before such trial has commenced, and whether an indictment has been preferred against him or not, notify the sheriff that he desires to re-elect, and it shall thereupon be the duty of the sheriff and judge or prosecuting officer to proceed as directed by section 766, and thereafter unless the judge, or the prosecuting officer acting under subsection 2 of that section, is of opinion that it would not be in the interests of justice that the prisoner should be allowed to make a second election, the prisoner shall be proceeded against as if his said first election had not been made."

NOTE.—It had been held that the technical effect of a prisoner's having once elected to be tried by jury was that his power to elect was thereby exhausted. That rule delayed a trial uselessly, involved increased expense to the Crown and to the prisoner, and prolonged the time of imprisonment of a man who on the trial might be found not guilty. Subsection 5 is a new subsection intended to obviate the difficulty by providing that the prisoner may re-elect.

The other changes are necessitated by the change of procedure under section 766.

**Section 784. When magistrate may try indictable offence without consent.**—By repealing the subsection substituted for subsection 3 thereof, by chapter 40 of the Statutes of 1895, and substituting the following :—

"3. The jurisdiction of the magistrate in the provinces of Prince Edward Island and British Columbia, and in the North-west Territories, and the district of Keewatin, under this Part, is absolute without the consent of the party charged except in cases coming within the provisions of section 785, and except in cases under sections 789 and 790, where the person charged is not a person who under section 784, subsection 2, can be tried summarily without his consent."

**Section 785.**—By substituting the following therefor :—

**"785. Magistrate may try with consent.**—If any person is charged in the province of Ontario before a public magistrate

or before a stipendiary magistrate in any county, district or provisional county in such province, with having committed any offence for which he may be tried at a Court of General Sessions of the Peace, or if any person is committed to a jail in the county, district or provisional county, under the warrant of any justice of the peace, for trial on a charge of being guilty of any such offence, such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace.

" 2. This section shall apply also to police and stipendiary magistrates of cities and incorporated towns in every other part of Canada, and to recorders where they exercise judicial functions.

3. Sections 787 and 788 do not extend or apply to cases tried under this section ; but where the magistrate has jurisdiction by virtue of this section only, no person shall be summarily tried thereunder without his own consent."

NOTE.—The only change is in the addition of subsections two to three.

Section 785 formerly applied to Ontario only, and it is by this amendment extended to cities and incorporated towns elsewhere.

Subsection 3 is intended to make it clear that where a prisoner elects to be tried under this section the punishment, if he is found guilty, is to be the same as if he were tried otherwise. Sections 787 and 788 provide for the punishment by the magistrate in ordinary cases under the Summary Trials Part. Section 785 declares that in cases under that section a prisoner may be sentenced to the same punishment to which he would have been liable if he had been tried before the Court of General Sessions of the Peace, and at such general sessions a greater punishment might by law be inflicted than where the magistrate convicts under sections 787 and 788. A doubt having been expressed whether, notwithstanding the terms of the former section 785, the punishment to be imposed thereunder was not limited by sections 787 and 788, it was thought expedient to remove any such possible doubt. See *R. v. Conlin* (Ont.), 1 Can. Cr. Cas., 41.

Section 789.—By substituting the following therefor :—

**"789. False pretences, theft or receiving.**—When any person is charged before a magistrate with theft or with having

obtained property by false pretences, or with having unlawfully received stolen property, and the value of the property stolen, obtained or received exceeds ten dollars, and the evidence in support of the prosecution is, in the opinion of the magistrate, sufficient to put the person on his trial for the offence charged, such magistrate, if the case appears to him to be one which may properly be disposed of in a summary way, shall reduce the charge to writing, and shall read it to the said person, and, unless such person is one who, under section 784, subsection 2, can be tried summarily without his consent, shall then put to him the question mentioned in section 786, and shall explain to him that he is not obliged to plead or answer before such magistrate, and that if he does not plead or answer before him, he will be committed for trial in the usual course."

NOTE.—One amendment consists in striking out the words "and may be adequately punished by virtue of the powers conferred by this Part," which in the original followed the words "appears to him to be one which may properly be disposed of in a summary way."

That section gave the magistrate, under certain circumstances, jurisdiction to try theft, etc., where the value of the property exceeded \$10, if he thought the offence might be adequately punished under this Part. The words struck out were considered to be no longer necessary and as liable to mislead, because since the passing of the Act of 52 Victoria, chapter 46, the magistrate may in such cases impose the same punishment as if the accused had been convicted upon indictment.

The latter part of the section formerly read "unless such person is one who can be tried summarily without his consent" and in this the words "under section 784, subsection 2" are now inserted.

Section 790.—By substituting the following therefor :—

"790. **Punishment on plea of guilty.**—If the person charged as mentioned in the next preceding section consents to be tried by the magistrate, the magistrate shall then ask him whether he is guilty or not guilty of the charge, and if such person says that he is guilty, the magistrate shall then cause a plea of guilty to be entered upon the proceedings, and sentence him to the same punishment as he would have been liable to if he had been convicted upon indictment in the

ordinary way ; and if he says that he is not guilty, he shall be remanded to jail to await his trial in the usual course."

NOTE.—The amendment consists in the substitution of the words "he shall be remanded to jail to await his trial in the usual course" for "the magistrate shall proceed as provided in section seven hundred and eighty-six." The section formerly provided that if a person charged under the preceding section with theft, etc., where the value of the property *exceeds* \$10, pleads not guilty, the magistrate shall proceed as provided in section 786. So proceeding, he could, in case of conviction, impose a sentence of only six months' imprisonment (sec. 787), while if the prisoner pleaded guilty, he could, under section 790, impose the same punishment as if the case had been tried in the ordinary way. The amendment does away with this anomaly. It takes away the jurisdiction of the magistrate to try such cases at all where the prisoner says he is not guilty. This makes the law as it was up to the time the Code was passed. It was thought best that in such serious cases as may arise under these sections, the magistrate should have jurisdiction to try only where the accused pleads guilty. It will be seen, however, that so far as magistrates in cities and towns are concerned, this Act largely extends their jurisdiction, making it the same in all the provinces as that of magistrates in Ontario under section 785.

The direction in this section that the accused shall be "remanded to jail to await his trial" does not take away the right of the accused to apply for and be granted bail. Senate Debates 1899, page 547.

Section 801.—By substituting the following therefor :—

"801. **Transmitting depositions, etc.**—The magistrate adjudicating under the provisions of this Part shall transmit the conviction, or a duplicate of the certificate of dismissal, with the written charge, the depositions of witnesses for the prosecution and for the defence, and the statement of the accused, to the clerk of the peace or other proper officer for the district, city, county or place wherein the offence was committed, there to be kept by the proper officer among the records of the general or quarter sessions of the peace or of any court discharging the functions of a court of general or quarter sessions of the peace.

2. This section shall not apply to police magistrates, stipendiary magistrates, or recorders of cities or incorporated towns."

NOTE.—The former provision was that the records were to be sent to the next court of General or Quarter Sessions. The amendment is adapted from section 822 in Part LVI, "Juvenile Offenders."



**Section 806. Application of fines.**—By repealing this section, as it is amended by chapter 57 of the statutes of 1894.

See new section 927 in this Act.

**Section 827. Application of fines.**—By repealing this section.

See new section 927 in this Act.

**Section 832.**—By substituting the following therefor :—

**“832. Costs.**—Any court by which and any judge under Part LIV or magistrate under Part LV by whom judgment is pronounced or recorded, upon the conviction of any person for treason or any indictable offence, in addition to such sentence as may otherwise by law be passed, may condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he is convicted, if to such court or judge it seems fit so to do ; and the court or judge may include in the amount to be paid such moderate allowance for loss of time as the court or judge, by affidavits or other inquiry and examination, ascertains to be reasonable ; and the payment of such costs and expenses, or any part thereof, may be ordered by the court or judge to be made out of any moneys taken from such person on his apprehension (if such moneys are his own), or may be enforced at the instance of any person liable to pay or who has paid the same in such and the same manner (subject to the provisions of this Act) as the payment of any costs ordered to be paid by the judgment or order of any court of competent jurisdiction in any civil action or proceeding may for the time being be enforced : Provided, that in the meantime, and until the recovery of such costs and expenses from the person so convicted as aforesaid, or from his estate, the same shall be paid and provided for in the same manner as if this section had not been passed ; and any money which is recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom or out of which such costs and expenses have been paid or defrayed.”

Section 846.—By substituting the following therefor :—

**"846. Objections.**—No information, complaint, warrant, conviction or other proceeding under this Part shall be deemed objectionable or insufficient on any of the following grounds, that is to say :—

(a.) that it does not contain the name of the person injured, or intended or attempted to be injured ; or

(b.) that it does not state who is the owner of any property therein mentioned ; or

(c.) that it does not specify the means by which the offence was committed ; or

(d.) that it does not name or describe with precision any person or thing :

Provided that the justice may, if satisfied that it is necessary for a fair trial, order that a particular, further describing such means, person, place or thing, be furnished by the prosecutor.

2. The description of any offence in the words of the Act, or any order, by-law, regulation or other document creating the offence, or any similar words, shall be sufficient in law."

NOTE.—Adapted from the Imperial Act, 42 and 43 Vict. (1879), c. 49, s. 39. As to the former law see *R. v. Coulson*, 1 Can. Cr. Cas., 114, 117.

Section 864.—By substituting the following therefor :—

**"864. Common assault.**—Whenever any person is charged with common assault any justice may summarily hear and determine the charge.

2. If the justice finds the assault complained of to have been accompanied by an attempt to commit some other indictable offence or is of opinion that the same is, from any other circumstance, a fit subject for prosecution by indictment he shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same."

NOTE.—Before the Code of 1892 was enacted, a magistrate could dispose summarily of any case of common assault. But under the Code

either the complainant or the party complained against might refuse the magistrate the right to proceed, and the case had then to go before the grand jury and the party be indicted. The magistrate is by this Act given jurisdiction to summarily determine the complaint without regard to the desire of either the prosecutor or the defendant that it should be sent up for trial under indictment, and an indictment for *common* assault will only lie under the circumstances stated in subsection 2.

**Section 872. Hard labour on summary conviction.**—By adding the following paragraph at the end of subsection 1 thereof :—

“(c.) Whenever under such Act or law imprisonment with hard labour may be ordered or adjudged in the first instance as part of the punishment for the offence of the defendant, the imprisonment in default of distress or of payment may be with hard labour.”

NOTE.—It was held in *R. v. Horton*, 3 Can. Cr. Cas., 84, by the Supreme Court of Nova Scotia that section 872, which this amends, did not authorize an award of imprisonment *with hard labour* in default of payment of the fine unless the Act or law under which the conviction was made provided the same in respect of the non-payment of the penalty; and this notwithstanding that such Act or law authorized a punishment in the first instance by either imprisonment with hard labour or fine.

The present amendment suggested by Mr. Pelton, Q.C., of Yarmouth, N. S., does away with that anomaly and makes the procedure in this respect under the Summary Convictions clauses of the Code (Part LVIII.) conform with the procedure under the Summary Trials clauses (Part LV). See *R. v. Crowell* (N.S.), 2 Can. Cr. Cas., 34, and *R. v. Burtress* (N.S.), 3 Can. Cr. Cas., 536.

**916. Fines and forfeitures.**—By striking out the first five lines of subsection 2 and substituting the following therefor :—

“2. If such court is a superior court having criminal jurisdiction one of such rolls shall be filed with the clerk, prothonotary, registrar or other proper officer—

(a.) In the Province of Ontario, of the High Court of Justice.”

NOTE.—This amendment became necessary because of the abolition of the “Divisions” of the High Court of Justice of Ontario.

Section 927.—By substituting the following therefor :—

**“ 927. Application of fines, etc.**—Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any such law or of the proceeds of an estreated recognizance, the same shall be paid over by the magistrate or officer receiving the same to the treasurer of the Province in which the same is imposed or recovered, to be by him paid over to the municipal or local authority, if any, which wholly or in part bears the expenses of administering the law under which the same was imposed or recovered, or to be applied in any other manner deemed best adapted to attain the objects of such law and secure its due administration, except that—

(a.) all fines, penalties and forfeitures imposed in respect of the breach of any of the revenue laws of Canada, or imposed upon any officer or employee of the Government of Canada in respect of any breach of duty or malfeasance in his office or employment, and the proceeds of all recognizances estreated in connection with proceedings for the prosecution of persons charged with such breaches or malfeasance, and

(b.) all fines, penalties and forfeitures imposed for whatever cause in any proceeding instituted at the instance of the Government of Canada or of any department thereof in which that Government bears the cost of prosecution, and the proceeds of all recognizances estreated in connection with such proceedings, shall belong to Her Majesty for the public uses of Canada, and shall be paid by the Magistrate or officer receiving the same to the Receiver General and form part of the Consolidated Revenue Fund of Canada.

Provided that nothing in this section contained shall affect any right of a private person suing as well for Her Majesty as for himself, to the moiety of any fine, penalty or forfeiture recovered in his suit.”

NOTE.—Sections 806 and 827 which made partial provision in regard to the application of fines are repealed by this Act, and this general provision is inserted to cover all fines, penalties and forfeitures in respect of any laws of Canada.

Section 943.—By substituting the following therefor :—

- “**943. Deputy sheriffs, jailers, etc.**—The duties imposed upon the sheriff, jailer, medical officer or surgeon by the three sections next preceding, may be, and, in his absence, shall be performed by his lawful deputy or assistant, or other officer or person ordinarily acting for him, or conjointly with him, or discharging the duties of any such officer.”

NOTE.—This corrects an error whereby the preceding *two* sections were referred to instead of *three*.

Section 955. **Offences by penitentiary convicts.**—By adding at the end of subsection 3 thereof the following :—

“and provided further that where any one is sentenced for any offence who is, at the date of such sentence, serving a term of imprisonment in a penitentiary for another offence, he may be sentenced for a term shorter than two years to imprisonment in the same penitentiary, such sentence to take effect from the termination of his existing sentence or sentences.”

NOTE.—This provision is intended to provide for cases of escapes, attempts to escape, assaults on officers, etc., so that a person may be condemned to imprisonment in the same penitentiary after the expiration of his sentence, for a further term in respect of the escape, etc., although such further term is less than two years, the limit of punishment under sec. 159. Under the general law imprisonments for terms of less than two years are made in the common gaols and in prisons other than penitentiaries. Sec. 955 (2).

Section 957.—By substituting the following therefor :—

“**957. Sentence of whipping.**—Whenever whipping may be awarded for any offence, the court may sentence the offender to be once, twice or thrice whipped, within the limits of the prison, under the supervision of the medical officer of the prison, or if there be no such officer, or if the medical officer be for any reason unable to be present, then, under the supervision of a surgeon or physician to be named by the Minister of Justice, in the case of prisons under the control of the Dominion, and in the case of other prisons by

the Attorney-General of the province in which such prison is situated.

2. The number of strokes shall be specified in the sentence ; and the instrument to be used for whipping shall be a cat of nine tails unless some other instrument is specified in the sentence.

3. Whenever practicable, every whipping shall take place not less than ten days before the expiration of any term of imprisonment to which the offender is sentenced for the offence.

4. Whipping shall not be inflicted on any female."

Section 958, as amended by chapter 32 of the statutes of 1893.—By substituting the following therefor :—

**" 958. Imprisonment and fine.**—Every court of criminal jurisdiction and every magistrate under Part LV before whom any person is convicted of an offence and is not sentenced to death, shall have power in addition to any sentence imposed upon such person, to require him forthwith to enter into his own recognizances, or to give security to keep the peace, and be of good behaviour for any term not exceeding two years, and that such person in default shall be imprisoned for not more than one year after the expiry of his imprisonment under his sentence, or until such recognizances are sooner entered into or such security sooner given, and any person convicted by any such court or magistrate of any indictable offence punishable with imprisonment for five years or less may be fined in addition to or in lieu of any punishment otherwise authorized, in which case the sentence may direct that in default of payment of his fine the person so convicted shall be imprisoned until such fine is paid, or for a period not exceeding five years, to commence at the end of the term of imprisonment awarded by the sentence, or forthwith as the case may require.

2. Any person convicted of an indictable offence punishable with imprisonment for more than five years may be fined, in addition to, but not in lieu of, any punishment

otherwise ordered, and in such case, also, the sentence may in like manner direct imprisonment in default of payment of any fine imposed."

NOTE.—The first part of the former section read "any person convicted of an indictable offence punishable, etc.," and this is now varied to read "any person convicted *by any such court or magistrate* of an indictable offence punishable," etc. The court referred to is a court of criminal jurisdiction, and the word "magistrate" has the meaning given to it by Part LV. relating to Summary trials of indictable offences. See Sec. 782. This amendment is intended to remove a doubt as to whether a magistrate under the Summary trials Part (LV.) could impose a fine in lieu of imprisonment in a case within section 787.

The 2nd subsection is new and is designed especially for the Yukon Territory where the expense of maintaining long term prisoners is large.

Section 971.—By substituting the following therefor :—

"**971. Release on suspended sentence.**—In any case in which a person is convicted before any court of any offence punishable with not more than two years' imprisonment and no previous conviction is proved against him, if it appears to the court before which he is so convicted, that, regard being had to the age, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, with or without sureties, and during such period as the court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour.

2. Where the offence is punishable with more than two years' imprisonment the court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender.

3. The court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution, or some portion of the

same, within such period and by such instalments as the court directs."

NOTE—The former section 971 enacted that in the case of an offence "punishable with not more than two years' imprisonment" (that is, two years being the maximum punishment for the offence) the court might under certain circumstances and on certain conditions, instead of sentencing the offender at once, direct his release on probation of good conduct. Previous to the statutory enactment the court had this power in the case of offences without the restriction as to two years. The power of releasing on a suspended sentence in the case of an offence punishable (as a maximum) with more than two years' imprisonment is reinstated by the addition of subsection 2 but with the proviso that the prosecuting counsel concur.

Subsection 3, *supra*, is the former subsection 2 re-numbered.

Another change made is the substitution in the first subsection of the word "age" for "youth" in the recital of the circumstances having regard to which the power of conditional release is to be exercised.

Schedule One, FORM J.—By substituting the following therefor :—

" J.—(*Section 569.*)

#### INFORMATION TO OBTAIN A SEARCH WARRANT.

Canada.	}
Province of	
County of	

The information of A. B., of  
in the said county (*yeoman*), taken this  
day of in the year  
before me, J. S., Esquire, a justice of the peace, in and for  
the district (*or county, etc.*) of , who says  
that (*describe things to be searched for and offence in respect of which search is made*), and that he has just and reasonable  
cause to suspect, and suspects, that the said goods and  
chattels, or some part of them are concealed in the (*dwelling-  
house, etc.*) of C. D., of in the said district (*or county,*



*etc.) (here add the causes of suspicion, whatever they may be):* Wherefore (*he*) prays that a search warrant may be granted to him to search the (*dwelling-house, etc.*), of the said C.D., as aforesaid, for the said goods and chattels so stolen, taken and carried away as aforesaid (*or as the case may be*).

Sworn (*or affirmed*) before me the day and year first above mentioned, at            in the said county of

J. S.,

J. P., (*name of district or county, etc.*)

NOTE.—This is to correct a manifest slip in the position of the words “(*describe things to be searched for and offence in respect of which search is made*)” which were printed after the words “in and for the county” in the Code of 1892.

Schedule One, FORMS BB and CC.—By substituting the following therefor :—

“ BB.—(*Section 601.*)

#### RECOGNIZANCE OF BAIL.

Canada.  
Province of            ,  
County of            .

}  
}  
}

Be it remembered that on the            day of            , in the year            , A. B. of            (*labourer*) L. M. of            , (*grocer*), and N. O. of            , (*butcher*), personally came before (*us*) the undersigned, (*two*) justices of the peace for the county of            , and severally acknowledged themselves to owe to our Sovereign Lady the Queen, her heirs and successors, the several sums following, that is to say: the said A. B. the sum of            , and the said L. M. and N. O. the sum of            , each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, land and tenements respectively, to the

use of our said Sovereign Lady the Queen, her heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at                      before us.

J. S.,

J. N.,

*J.P. (name of county.)*

The condition of the within (*or* above) written recognizance, in such that whereas the said A. B. was this day charged before (*us*), the justices within mentioned for that (*etc., as in the warrant*); if, therefore, the said A. B. appears at the next superior court of criminal jurisdiction (*or* court of general or quarter sessions of the peace) to be holden in and for the county of                      , and there surrenders himself into the custody of the keeper of the common jail (*or* lock-up house) there, and pleads to such indictment as may be found against him by the grand jury, for in and respect to the charge aforesaid, and takes his trial upon the same, and does not depart the said court without leave, then the said recognizance to be void, otherwise to stand in full force and virtue.

“ CC.—(*Section 602.*)

WARRANT OF DELIVERANCE ON BAIL BEING GIVEN FOR A  
PRISONER ALREADY COMMITTED.

Canada.		}
Province of	,	
County of	,	

To the keeper of the common jail of the county of  
at                      , in the said county.

Whereas A. B. late of                      , (*labourer*), has before (*us*)  
(*two*) justices of the peace in and for the said county of  
                    , entered into his own recognizance, and found suffi-

cient sureties for his appearance at the next superior court of criminal jurisdiction (*or* court of general or quarter sessions of the peace), to be holden in and for the county of \_\_\_\_\_ to answer our Sovereign Lady the Queen, for that (*etc., as in the commitment*), for which he was taken and committed to your said common jail: These are, therefore, to command you, in Her Majesty's name, that if the said A. B. remains in your custody in the said common jail for the said cause, and for no other, you shall forthwith suffer him to go at large.

Given under our hands and seals, this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, at \_\_\_\_\_, in the county aforesaid.

J. S. [SEAL.]

J. N. [SEAL.]

*J. P. (name of county.)"*

NOTE.—The old courts of Oyer and Terminer and General Jail Delivery have been done away with in most of the provinces. The amendment consists in the substitution of the expression "superior court of criminal jurisdiction" for the words "court of oyer and terminer or general gaol delivery" which were used in the old forms BB. and CC.





## INDEX.

### Accessory

Owner leasing house for purposes of prostitution; Keeping common bawdy house. 472

### Accusation

#### *Accusing with intent to extort.*

Where an information for rape or other offence under Cr. Code 405 is laid with the sole intent to extort money or property from the person against whom the charge is made, the informant thereby "accuses" such person with intent to extort or gain something from him under Cr. Code 405; and commits an indictable offence thereunder. R. v. KEMPEL, (ONT.) 481

### Adjournment

#### *Recital of adjournments of hearing—Presumptions.*

A conviction in the form prescribed by the Criminal Code is not bad because it also contains recitals shewing certain adjournments of the hearing before the justice but not shewing that no adjournment had been made for a longer period than the eight days allowed by Cr. Code section 857, sub-section (1), although more than three months had elapsed from the commencement to the end of the proceedings. The hearing before a justice trying a person for an offence punishable on summary conviction may be adjourned from time to time under section 853 of the Code, although the accused be not present, provided the adjournments are made in the presence and hearing of his solicitor or agent. PROCTOR v. PARKER, (MAN.) 374

### Admissibility

See EVIDENCE.

### Admissions

See EVIDENCE.

### Age

Proving age of juvenile. 584

## Amendment

### *Certiorari—Return of an amended conviction.*

A summary conviction which illegally imposes imprisonment *with hard labor* in default of payment of the fine, may be amended at any time before it is acted upon, by the return of an amended conviction omitting the words "with hard labor" but in other respects conforming to the adjudication. Such an amended conviction may be returned in answer to certiorari process although the first conviction has been transmitted by the magistrate, pursuant to a statutory requirement, to the court to which an appeal might be taken therefrom.

R. v. MCANN, (B.C.) 110

## Animals

Stealing domestic animals.

571

## Animus

### *Negligence—Manslaughter—Indictment of corporation.*

A corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others.

R. v. GREAT WEST LAUNDRY CO. (MAN.) 514

And see INTENT.

## Appeal

### *From order quashing summary conviction.*

Except where specially authorized by statute, an appeal does not lie in Ontario to the Court of Appeal from an order of the High Court of Justice quashing a summary conviction made under a provincial statute.

R. v. CUSHING, (ONT.) 306

### *Appeal not a matter of procedure.*

A right of appeal is not a matter of procedure under article 503 of the Montreal City Charter, which enacts that the provisions of part LVIII of the Criminal Code shall apply to prosecutions under the charter "as regards the mode of procedure" therein; and there is consequently no appeal from the Recorder's Court of Montreal to the Court of Queen's Bench, from a conviction for carrying on the business of a pawnbroker without a license.

SUPERIOR v. CITY OF MONTREAL, (QUE.) 379

### *Harboring deserting seaman—Seamen's Act (Can.)*

The appeal from a summary conviction under the Seamen's Act of Canada for harboring and secreting a deserting seaman

**Appeal—Continued.**

is under section 879 and not under section 742 of the Criminal Code, and in the Province of Quebec the appeal should be taken to the Crown Side and not to the Appeal Side of the Court of Queen's Bench of that province.

R. v. O'DEA, (QUE.) 402

*From summary trial—Cr. Code 782, 783.*

No appeal lies from the decision of a Judge of the Sessions, Police Magistrate, District Magistrate, or other functionary mentioned in Cr. Code sec. 782a (1), holding a "summary trial" under Cr. Code 783.

R. v. RACINE, (QUE.) 446

*Keeping disorderly house.*

A person convicted, under the Summary Trial clauses, of having kept a disorderly house constituting a nuisance has no right of appeal other than by way of case reserved or case stated under Cr. Code 743 and 744.

R. v. BOUGIE (QUE.) 487

Court of Criminal Appeal in Ontario.

562

Motion for leave ; Code Amendment, 1900.

586

**Appearance***Defect in service—Appearance by counsel.*

The defendant's appearance by counsel upon the return of a magistrate's summons is a waiver by any irregularity in respect of the service not having been effected by a peace officer, although counsel objects on that ground to the hearing being proceeded with. The absence of defendant's counsel from the adjourned sittings at which the magistrate pronounced his judgment, the evidence having been closed at the former sittings at which counsel appeared, does not affect the power of the magistrate to convict, notwithstanding any such irregularity in the service.

R. v. DOHERTY, (N.S.) 505

Note on appearance of accused compelled by irregular process ; Subsequent detention and commitment ; Validity of.

150

**Arraignment**

Note on the arraignment of accused persons

271

Before County Judge ; Election of mode of trial.

589



## Arrest

### *Warrant of arrest—Magistrate's refusal to issue.*

A magistrate is not under a legal obligation to issue a warrant of arrest upon an information in respect of an indictable offence, if on the consideration of the complainant's allegations he is of opinion that a case for so doing is not made out. (Cr. Code 559.) A magistrate refusing to issue a warrant on an information for an indictable offence, is not bound to state his reason for so doing; he has merely to express his opinion, after a consideration of the complainant's allegations, as to whether a warrant should be issued or not. That a magistrate did not properly appreciate the evidence submitted upon an application for the issue of a warrant of arrest for an indictable offence is not a ground for a mandamus to compel him to grant a warrant against his opinion, formed in good faith.

THOMPSON v. DESNOYERS, (QUE.) 68

### *Warrant without sworn information—Peace officer.*

If a justice of the peace is not himself personally arresting the offender on view or upon suspicion, or personally acting in effecting the arrest by calling some one to his assistance in making the same, he can legally direct the arrest only by a warrant issued upon a written complaint or information upon oath. A justice of the peace who illegally issues a warrant without having received a sworn information in respect of the charge is liable in trespass for the arrest made thereunder, and he cannot justify the commanding of the constable to make the arrest by showing that he, the justice, had a reasonable suspicion that an offence had been committed. (Cr. Code, s. 22.)

MCGUINNESS v. DAFOE, (ONT.) 139

### *Information must be sworn.*

A summons may be issued upon an information before a Justice of the Peace for an offence punishable on summary conviction, although the information has not been sworn (Cr. Code 843, 845) but before a warrant can be issued to compel the attendance of the accused, there must be an information in writing and under oath (Cr. Code 558, 843).

R. v. WILLIAM McDONALD, (N.S.) 287

## Assault

Procedure in cases of common assault.

595

**Bail***Bail—Recognisance to appear for 'sentence.'*

Where on a trial upon an indictment a verdict of guilty was returned, but a reserved case was granted upon a question of law, and the accused admitted to bail, the condition of the recognizance taken being that the accused would appear at the next sitting of the Court 'to receive sentence,' the condition of the recognizance is not broken if the accused fails to appear after judgment is given on the reserved case quashing the conviction and ordering a new trial. The conviction having been set aside, the accused was entitled to presume that he would not be called for sentence, and the sureties were not bound for his appearance for any other purpose than to receive sentence. A roll of estreated recognizance and a writ of fieri facias against the sureties thereon will in such a case be set aside on motion to the Full Court. *R. v. ALEXANDER HAMILTON, (MAN)*

*Recognisance of bail—Estreat—Discretionary discharge.*

An order made under Cr. Code, sec. 922, for the discharge of a forfeited recognizance is a civil and not a criminal proceeding. The discretionary order for the discharge of a forfeited recognizance authorized by sec. 922 of the Criminal Code to be made by the Court into which any writ of fieri facias and capias issued under part LIX of the Code is returnable, must be made by the Court en banc, and not by a single Judge.

RE MCARTHUR'S BAIL, (N.W.T.) 195

Note on recognizance of bail; Form of condition; Estreat.	7
Recognizance on remand; Breach of.	578
Recognizance for next Court of Sessions.	579
Recognizance of; Amended form of 1900.	602

**Bank***Officer making false statutory return.*

An indictment charging bank officials with having made a monthly report, etc., "a wilful, false and deceptive statement" of and concerning the affairs of the Bank, with intent to deceive, sufficiently charges the offence, under section 99 of The Bank Act, of having made, "a wilfully false or deceptive statement in any return or report" with such intent.

R. v. WEIR (NO. 1), (QUE.) 102

False return by bank official; Bank Act (Can.) s. 85, 99.	262
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## Bawdy house

### *Owner leasing house for purposes of prostitution.*

The owner of a house who leases it to another person knowing and assenting when the lease was made to the purpose of the latter to maintain it as a common bawdy house, thereby does an act for the purpose of aiding the lessee to commit the indictable offence by keeping a disorderly house, and he may be indicted and convicted as a principal under Cr. Code sec. 61 (b.)

R. v. ROY, (QUE.) 472

### *Evidence in prior trial of another person as keeper.*

On a charge of being an inmate of a bawdy house it is competent for the accused or her counsel to consent that the evidence which had been given before the magistrate upon a concluded trial of another person for keeping the bawdy house, should be read as evidence in the case.

R. v. ST. CLAIR, (ONT.) 551

### *Evidence of reputation and disorderly conduct.*

A conviction should not be made upon a charge of keeping, or being an inmate of, a bawdy house upon evidence of general reputation only, and the prosecution should be required to produce proof of acts or conduct from which the character of the house may be inferred. The conduct and statements of the inmates of an alleged bawdy house at the time of their arrest therein may properly be proved in support of the charge.

R. v. ST. CLAIR, (ONT.) 551

## Burglary

Code Amendment of 1900.

572

## By-law

### *Enacting clause too extensive.*

A summary conviction under the Ontario Municipal Act for peddling without a license is bad if the municipal by-law, although reciting the exceptions contained in the proviso of sec. 583 (14), is not so limited as regards its enacting sections.

R. v. SMITH, (ONT.) 383

Municipal by-law; Negating exception; Amendment; Note on.

385

**Canada Temperance Act***Military Canteen—Canada Militia Act, R.S.C, c. 41.*

Officers and men of the Canadian active militia while in training at a camp of exercise have an equal right with members of the Canadian Infantry school corps to purchase intoxicating liquors at an infantry school canteen, under conditions of the Queen's Regulations for the Army, and this notwithstanding that the second part of the Canada Temperance Act is in force in the district.

EX PARTE PATCHELL, (N.B.) 75

*Company—Sale of Intoxicating Liquors by.*

The president of an incorporated company acting as manager thereof is responsible for an illegal sale of intoxicating liquors, made by one of the company's clerks acting under his general directions, and may be convicted, in respect of such sale, of an offence under the Canada Temperance Act.

EX PARTE BAIRD, (N.B.) 65

*Information before one justice of the peace.*

Notwithstanding section 842 of the Criminal Code, where a prosecution for an offence under the Canada Temperance Act is to be proceeded with before two justices of the peace, the information must be laid before two justices.

EX PARTE WHITE, (N.B.) 94

*Search warrant for liquors—Description of premises.*

A search warrant for intoxicating liquors issued under the Canada Temperance Act is not invalid because it does not shew on its face that the premises directed to be searched are within the territorial jurisdiction of the magistrate. It is not necessary that the premises directed to be searched should be described in the search warrant by metes and bounds or with other particularity of a like nature, and a direction to search the dwelling house of a named person in a certain township is sufficient. A direction to search several buildings or places in respect of any one charge may be made by the one search warrant. A warrant affords absolute justification to the officer executing it if it has been issued by competent authority and is valued on its face, although the warrant may in fact be bad and although it be set aside by reason of a failure to comply with legal requirements. A judgment on certiorari quashing a search warrant for intoxicating liquors issued under the Canada Temperance Act does not constitute a judgment *in rem* in respect of the

**Canada Temperance Act—Continued.**

liquors seized. A judgment on certiorari quashing a search warrant for intoxicating liquors issued under the Canada Temperance Act is not *res judicata* as to the constable who executed the warrant, if he was not a party to and had no notice of the certiorari proceedings. **SLEETH v. HURLBERT, (CAN.) 197**

*Two justices receiving the information.*

The issue of a summons, whether in relation to an offence punishable summarily or to an indictable offence, is a judicial act. Notwithstanding section 105 of the Canada Temperance Act and section 842 of the Criminal Code, an information charging an offence under the Canada Temperance Act must be laid before two justices, who must concur in directing the issue of the summons, but it is not necessary that the information or the summons issued thereon should be signed by more than one of such justices. **R. v. ETTINGER, (N.S.) 387**

*Excessive penalty in default of distress.*

Where in a summary conviction it was adjudged that in default of payment of the fine and of the amount taxed to the prosecutor for his costs, and in default of sufficient distress therefor, the defendant be imprisoned for a term specified, unless such fine and costs, etc., and the *costs of the commitment*, were sooner paid, the words "costs of the commitment" irregularly included therein may be treated as surplusage, and their inclusion will not invalidate the conviction, if, in fact, there are no costs of commitment apart from the costs taxed and allowed in the conviction and warrant of commitment. **R. v. DOHERTY, (N.S.) 505**

**Case reserved**

See RESERVED CASE.

**Cattle frauds**

- Cattle brands as evidence. 586
- Defacing cattle brands. 571
- Wrongful appropriation of stray cattle. 571

**Certiorari***Appeal—Discretion to refuse certiorari.*

Where there is a right of appeal from a summary conviction, and it appears upon an application for a certiorari to bring up the conviction to be quashed that the ground alleged therefor is more properly the subject of an appeal, the discretion of the Court should be exercised by refusing the certiorari.

**R. v. HERRELL (No. 2.) (MAN.) 15**

**Certiorari—Continued.***Enforcement of conviction after certiorari granted.*

If the writ of certiorari issued to remove a summary conviction into the High Court of justice was served only upon the Clerk of the Peace with whom the conviction was filed, and not upon the convicting magistrate, and the magistrate having no knowledge that certiorari had been directed, thereafter enforced the conviction, he is not guilty of contempt of court in so doing.

R. v. WOODYATT, (ONT.) 275

**Cheating**

See FALSE PRETENCES.

**Children***Duty to provide necessities to—Master and servant.*

A person who engages the services of a child under sixteen years, placed out with him by his legal guardian under a contract for the child's services for a fixed period, whereby the party with whom he is placed engages to furnish the child with board, lodging, clothing, and necessities, is not as to such child a "guardian or head of a family" so as to become criminally responsible as such, under Cr. Code sec. 210, for omitting to provide "necessaries" to such child while a member of his household. The relationship in such case is that of master and servant, and comes within the provisions of Cr. Code sec. 211, under which the master is criminally responsible only in respect of a failure to provide "necessary food, clothing, or lodging." Section 211 of the Code does not impose a criminal responsibility upon the master to provide the servant with medical attendance or medicine, and, *semble*, per Rouleau, J., medical aid is not within the term "necessaries" under Cr. Code, 210. The Court should not, without expert evidence upon the effect of the loss of a child's toes resulting from exposure to cold, and their consequent amputation, infer that the child's health had thereby been or was likely to be "permanently injured" (Cr. Code, 211), or that his life has thereby been endangered.

R. v. COVENTRY, (N.W.T.) 541

**Code Amendment (1900)**

Statutes of Canada, 53 Vict. c. 46.

561-604

## Comment

### *Comment on failure of accused to testify.*

Where, during the address to the jury by the prisoner's counsel, the counsel for the Crown interjects a remark, in the hearing of the jury, intimating that the prisoner could have given evidence as to an alleged occurrence then being referred to, and it appears that the ascertainment of whether or not such occurrence took place is not in fact material to the issue, such comment is not a ground for ordering a new trial.

R. v. WEIR (No. 3), (QUE.) 262

## Commission

To examine witnesses abroad.

583

## Commitment

### *Finding sureties to keep the peace—Default.*

When a justice of the peace makes an order under Cr. Code section 959, requiring a person to give security to keep the peace, he must fix the amount of the recognizance to be given. A justice's order that the accused give security to keep the peace for one year, but not fixing any amount nor a term of imprisonment in default, will not support a commitment thereunder. A warrant of commitment under Cr. Code section 959 and form YYV, can only be issued after the defendant's refusal or neglect to furnish the required security, proved and recorded subsequently to the order requiring the security, and it must recite such refusal or neglect.

RE JOHN DOE, (QUE.) 370

### *To whom fine to be paid.*

A commitment stating that the prisoner shall be detained until the fine shall be paid to the keeper of the gaol is regular although the conviction says that the fine is to be paid to the clerk of the Recorder's Court.

R. v. BOUGIE, (QUE.) 487

### *Stating locality of offence.*

The Courts will take judicial notice of the local divisions such as counties, municipalities, and polling sections into which their country is divided, for purposes of political government.

EX PARTE MACDONALD, (CAN.) 10

## Common assault

Procedure in cases of.

595

**Company**

See CORPORATION.

**Complaint**

Note on evidence of complaint made in rape and similar offences ; Practice on tendering such evidence. 26

**Confession**

Note on admissibility of confessions obtained from prisoners. 99  
And see EVIDENCE.

**Consideration**

*Imprisonment in default of paying fine—Release from.*

Release from imprisonment in default of payment of a fine imposed on conviction for an offence against The Fires Prevention Act, R.S.M., c. 60 may be a good consideration for a promissory note to secure payment of the fine and costs, given to the parties interested in the penalty.

PROCTOR v. PARKER, (MAN.) 374

**Conspiracy**

Trade combines, etc. 575

**Construction of statutes**

*Statutes in pari materiâ.*

The Lord's Day Act of Ontario is to be construed as in pari materiâ with the English statute, 29 Car. 2, c. 7, at one time in force in Ontario.

R. v. ALBERTIE, (ONT.) 356

**Conviction**

*Negating exception of enacting clause.*

A summary conviction under the Ontario Municipal Act for peddling without a license is bad if the municipal by-law, although reciting the exceptions contained in the proviso of sec. 583 (14), is not so limited as regards its enacting sections. A conviction under the Ontario Municipal Act for peddling without a license is bad if it does not negative the exceptions contained in the proviso of the enacting clause, and it cannot be amended unless the evidence shows whether or not the defendant's acts came within the exceptions.

R. v. SMITH, (ONT.) 383



**Conviction—Continued.***Imprisonment—Computation of term.*

A conviction which declares that the convicted person is condemned to be imprisoned during the space of six months to be computed from the day of her arrival as a prisoner in the common jail of the district is sufficient, and the day from which the term of the sentence is to be computed is thereby sufficiently expressed.

R. v. BOUGIE, (QUE.) 487

**Convicts**

Imprisonment of penitentiary convict for further term less than two years.

598

**Corporation***Manslaughter—Indictment of corporation for.*

A corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others. Cr. Code secs. 213 and 220, as to want of care in the maintenance of dangerous things, do not extend the criminal responsibility of corporations beyond what it was at common law. There is no power, under Code section 639 or otherwise, to impose a fine or any other punishment, in lieu of imprisonment, for the offence of manslaughter, and there is consequently no judgment or sentence applicable to a conviction of a corporation for that offence.

R. v. GREAT WEST LAUNDRY CO., (MAN.) 514

*Neglect of duty causing death.*

Although a corporation cannot be guilty of manslaughter, it may be indicted under Cr. Code sec. 252, for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge or structure which it was its duty to so maintain, and this notwithstanding that death ensued at once to the person sustaining the grievous bodily injury. A fine is the punishment which must be substituted under Cr. Code sec. 639 in the case of a corporation, in lieu of the imprisonment mentioned in Cr. Code sec. 252, and the amount is in the discretion of the court (Cr. Code sec. 934). The expression "grievous bodily injury" includes injuries immediately resulting in death, and as a corporation is not amenable to a charge of manslaughter, the death is as to it a circumstance in aggravation of the crime, and does not enlarge the nature of the offence.

R. v. UNION COLLIERY CO., (B.C.) 523

**Corroboration**

See EVIDENCE.

**Costs***Certiorari—Return of an amended conviction.*

Where the only record of conviction produced before the institution of certiorari proceedings to quash the same is bad, and a valid amended conviction is produced in such proceedings, the costs of opposing the motion to quash should not be awarded against the applicant. R. v. MCANN, (B.C.) 110

Award of costs against private prosecutor when bill of indictment ignored; Review by Court en banc. 312

*Irregular "costs of commitment."*

Where in a summary conviction it was adjudged that in default of payment of the fine and of the amount taxed to the prosecutor for his costs, and in default of sufficient distress therefor, the defendant be imprisoned for a term specified, unless such fine and costs, etc., and the *costs of the commitment*, were sooner paid, the words "costs of the commitment" irregularly included therein may be treated as surplusage, and their inclusion will not invalidate the conviction, if, in fact, there are no costs of commitment apart from the costs taxed and allowed in the conviction and warrant of commitment.

R. v. DOHERTY, (N.S.) 505

*Summary trial of indictable offence.*

A magistrate summarily trying, with the consent of the accused, a charge of aggravated assault, has jurisdiction to award costs against the accused as well as to impose both fine and imprisonment. R. v. BURTRESS, (N.S.) 536

Order for, on trial of indictable offence. 594

**Counterfeiting**

Counterfeit token, what is. 574

**Criminal Code of Canada.**

Section	3 (e).	561
	3 (f).	514
	3 (g).	561
	18.	197
	22.	139
	23.	139
	61.	472
	138.	122
	144.	152
	166 A.	562
	179.	562
	180.	563
	183.	564
	183 A.	565
	186 A.	565
	187.	565
	189.	566
	192.	523
	195.	472, 487
	196.	439, 495
	198.	72, 439, 472, 487, 495
	205.	566
	207.	551, 567
	208.	567
	209.	541
	210.	410, 413, 541, 567
	211.	541
	213.	514, 523
	220.	514
	252.	523
	259.	22
	264.	568
	266.	293
	267.	22
	278.	329, 330, 331, 568
	284.	569
	285.	570
	305.	54, 127
	306.	570
	311.	54, 127
	331 A.	571
	332.	571
	404.	486
	405.	481, 486
	406.	220
	410.	572
	431.	155, 499
	443.	421
	446.	421
	449.	572
	479.	574
	501.	84
	520.	575
	533.	576
	540.	576

**Criminal Code of Canada—Continued.**

Section 550 A.	577
553.	578
558.	68, 139, 185, 287, 289, 290, 481
559.	68, 122, 139, 287, 290, 387
562.	286
563.	186
589.	578
590.	310
595.	313
596.	467
600.	451
601.	451, 467, 579
611.	102, 499
613.	155
629.	499
634.	89
639.	514, 523
641.	29, 155, 579
645.	29
667.	262, 272
668.	273, 274
678 A.	581
679.	581
680.	582
683.	583
687.	583
690.	551
698.	224
701 A.	584
702.	584
703.	585
707 A.	586
723.	262, 499
729.	586
742.	402
743.	1, 9, 413, 487
744.	215, 487, 586
746.	1, 215, 219, 220, 259
760.	29, 587
763.	587
765.	451, 467, 588
766.	588
767.	451, 589
777.	339, 349
782.	446, 487
783.	72, 74, 152, 446, 487, 536, 551
784.	72, 74, 487, 551, 590
785.	590
786.	152
788.	487, 536, 538
789.	591
790.	592
791.	72
798.	551
800.	536

**Criminal Code of Canada—Continued.**

Section 801.	593
808.	487, 594
827.	594
832.	594
840.	379
842.	94, 387
843.	185, 287, 290, 291, 387
845.	287
846.	595
853.	286, 374
855.	505
857.	374, 505
859.	536, 539
864.	595
872.	84, 505, 538, 596
879.	379, 402
880.	402
889.	385
890.	385
900.	402
910.	451
914.	1
916.	1, 596
922.	195
927.	597
934.	523
943.	598
955.	84, 536, 598
957.	598
958.	599
959.	370
971.	600
Form J.	601
BB.	602
CC.	602, 603
WW.	374
YYY.	370

**Criminal procedure**

Power to make rules of.	576
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**Customs Act***Goods imported without payment of lawful duties.*

Section 197 of the Customs Act of Canada as amended in 1888 is to be construed as making the punishment of fine or imprisonment (therein provided to be 'in addition to any other penalty') applicable as well where the goods unlawfully imported into Canada are found and are thereupon liable to be forfeited and seized, as where they are not found, in which latter event the offender forfeits the value thereof.

O'GRADY v. WISEMAN, (QUE.) 332

**Defamatory libel**

See LIBEL.

**Defect**

In information, conviction, etc.: Code Amendment, 1900. 595

**Defilement**

Householders inducing or permitting on premises. 187

Of idiots. 189

**Deliverance**

Warrant of, on bail being given for a prisoner already committed. 603

**Depositions**

Failure to have witness sign his depositions; Matter of procedure; Jurisdiction of magistrate. 310

Use of depositions taken before magistrate, in the subsequent trial. 583

Magistrate to transmit depositions. 593

And see EVIDENCE.

**Deputy officers**

Authority of, in certain cases. 598

**Dies non**

Verdict, etc., on holiday. 586

**Disorderly House***Gaming house—Discretion to refuse summary trial.*

The term "disorderly house" in Cr. Code 783 (*f*) applies only to those cases which fall within the statutory definition of that term given in Cr. Code 198. Upon a charge under Cr. Code 783 and 784 of keeping a 'disorderly house' in that the accused is alleged to be keeping a gaming house, the police magistrate has jurisdiction to hear and determine the charge summarily without the consent of the accused, but the exercise of that jurisdiction is discretionary with the magistrate, and he may instead proceed as with a preliminary inquiry, and commit the accused for trial.

EX PARTE JOHN COOK, (B.C.) 72

*Offence of keeping—Aiding and abetting.*

The owner of a house who leases it to another person knowing, and assenting when the lease was made to the purpose of the

**Disorderly House—Continued.**

latter to maintain it as a common bawdy house, thereby does an act for the purpose of aiding the lessee to commit the indictable offence of keeping a disorderly house, and he may be indicted and convicted as a principal under Cr. Code sec. 61 (b).

R. v. ROY, (QUE.) 472

*Summary trial—Jurisdiction.*

The recorder of the City of Montreal may, as a "magistrate" under Cr. Code 782, summarily try and condemn a person keeping a disorderly house in a manner constituting a nuisance, to a period of imprisonment of six months and to a fine of \$100, or, in default of payment of this fine, to six other months.

R. v. BOUGIE, (QUE.) 487

"Disorderly house"; Note on meaning of.

74

**Distress**

Hard labour in default of.

536, 596

**Election law***Secrecy of ballot—Compulsory disclosure by witness.*

Notwithstanding sec. 71 of the Dominion Elections Act, a voter called as a witness in a trial on an indictment charging a criminal offence may be required to state for whom he voted. The provision of sec. 71 applies only to election petitions or other legal proceedings questioning the election or return, and not to a prosecution of a deputy returning officer for fraudulently putting into a ballot box false ballot papers. The answer of a witness stating for whom he voted is not secondary evidence because the vote was by mark upon a paper not produced, upon which the candidates' names were printed, and on which there was or should be nothing to identify the ballot as that marked by the voter; and such evidence is admissible without production of the ballots.

R. v. SAUNDERS, (MAN.) 278

**Escape**

Permitting escape.

562

**Estreat**

Forfeiture under recognizance.

596

And see BAIL.

**Evidence***Proof of registration—Exception of registered druggist.*

Where the defence to a summary prosecution for selling liquor without a license is that the accused was entitled to do so under

**Evidence—Continued.**

a statutory exception respecting registered druggists, and by statute the onus is expressly cast on the accused to prove himself within the exception, and provision made for proving the register by the production of a printed copy thereof, the viva voce testimony of the accused that he is a duly registered druggist is not competent evidence of the fact, and the magistrate may disregard the same, although no objection was taken to the admission of such testimony.

R. v. HERRELL (No. 2), (MAN.) 15

***Confession—Interrogation by police officer of.***

Admissions made by a prisoner to a police officer in respect of the charge upon which he is in custody, are admissible in evidence although made in response to questions put by the officer, if the trial judge finds that the answers were not unduly or improperly obtained, having regard to the circumstances of the particular case.

R. v. ELLIOTT, (ONT.) 95

***Proof of threatening letter—Handwriting.***

Where, in a charge of sending a threatening letter to a person with intent to extort money, it is proved that the accused had stated that he had written a letter to such person, and that he had stated its purport in language to the like effect as the threatening letter, it is not error for the Court to admit the threatening letter in evidence without further proof of the handwriting, and to submit to the jury for comparison with an exhibit, already in evidence, admittedly written by the accused. A jury may properly make a comparison of doubtful or disputed handwriting, and draw their own conclusion as to its authenticity, if the admittedly genuine handwriting and the disputed handwriting are both in evidence for some purpose in the case, although no witness was called to prove the handwriting to be the same in both.

R. v. DIXON (No. 2), (N.S.) 220

***Improper reception cured by subsequent evidence.***

An error in receiving in evidence a document insufficiently proved may be cured by the subsequent evidence in the case; and it is not necessary to again tender the document after the evidence necessary to complete its proof has been disclosed.

R. v. DIXON (No. 2), (N.S.) 220

***Permanent injury to health—Expert evidence.***

The Court should not, without expert evidence upon the effect of the loss of a child's toes resulting from exposure to cold, and



**Evidence—Continued.**

their consequent amputation, infer that the child's health had thereby been or was likely to be "permanently injured" (Cr. Code 211), or that his life has thereby been endangered.

R. v. COVENTRY, (N.W.T.) 541

Rape and similar offences; Evidence of complaint made soon afterwards; Note on admissibility. 26

Confession; Admissions on interrogation of accused person in custody. 99

Answers not unduly or improperly obtained; Onus upon prosecution. 101

Depositions taken on the preliminary enquiry; When admissible. 583

And see EXTRADITION.

**Excuse**

See WITNESS.

**Extortion***Accusing with intent to extort—Laying information.*

Where an information for rape or other offence under Cr. Code 405 is laid with the sole intent to extort money or property from the person against whom the charge is made, the informant thereby "accuses" such person with intent to extort or gain something from him under Cr. Code 405; and commits an indictable offence thereunder.

R. v. KEMPEL, (ONT.) 481

**Extradition***Power of Extradition Commissioner.*

An extradition commissioner appointed under the Extradition Act (Can.) has jurisdiction only within the province for which he has been appointed; and has the power to issue a warrant for the arrest of a fugitive only in case the latter is in or is suspected to be in the province in which the commissioner has jurisdiction.

EX PARTE SEITZ, (NO. 1), (QUE.) 54

*Execution of warrant in another province.*

Where the complaint in an extradition matter shows that the fugitive is in a province other than the one in which the commissioner has jurisdiction, and other than the one in which the extradition complaint is laid, the issue of a warrant of arrest thereon and its execution in such other province is illegal.

**Extradition—Continued.**

When a warrant of arrest has been legally issued by an extradition commissioner, it may be executed in any part of Canada without endorsement.

EX PARTE SEITZ, (No. 1), (QUE.) 54

*Habeas corpus—Review of findings.*

On the return of a writ of habeas corpus in an extradition proceeding, the judge has no power to review the decision of the extradition commissioner on the ground that it is against the weight of evidence.

EX PARTE SEITZ (No. 1), (QUE.) 54

*Discharge for want of jurisdiction.*

When a prisoner is discharged upon habeas corpus merely by reason of a defect in the commitment or for lack of jurisdiction in the committing magistrate, such discharge is not a bar to the prisoner's re-arrest and trial before a court of competent jurisdiction in respect of the same charge. To constitute such a bar, the case must be such that the return to a second writ of habeas corpus following the re-arrest would raise the same question as the first with reference to the validity of the grounds of detention.

EX PARTE SEITZ (No. 2), (QUE.) 127

*Extradition Commissioner—Territorial jurisdiction.*

Where a person known to be in the Province of Ontario is arrested there under an extradition warrant issued by an Extradition Commissioner of the Province of Quebec, and is taken to the latter Province under such warrant, and there discharged upon habeas corpus for want of jurisdiction in the Commissioner to issue a warrant unless the fugitive is in or suspected to be in the Province for which he has jurisdiction, the accused may, notwithstanding, be legally re-arrested in Quebec province under a new complaint in respect of the same extradition offence. Semble, that the Commissioner may decline to exercise his jurisdiction upon the new complaint if the prisoner has been inveigled into his jurisdiction by a trick or device of the adverse party.

EX PARTE SEITZ (No. 2), (QUE.) 127

*Proof of foreign law.*

Before ordering the extradition from Canada of a fugitive, an Extradition Commissioner must be satisfied that the offence charged is a crime against the law of the country demanding the extradition, as well as that it would, if committed in Canada, be an offence against Canadian law, and that it is within the treaty with the foreign country.

EX PARTE SEITZ (No. 2), (QUE.) 127

**Extradition—Continued.***Authorisation by demanding country—Proof of requisition.*

Proceedings in extradition may be regularly initiated in Canada before any requisition is made by the country entitled to make the demand for extradition. Extradition proceedings in Canada are not void because, during the course of same, no proof was adduced to shew that the extradition complaint was laid under the direction or authorization of the country in which the alleged offence was committed; and it is sufficient that the requisition of the demanding country be made in due time after the commitment for surrender.

RE M. B. LAZIER, (ONT.) 167

*Habeas corpus—Appeal—Motion to quash.*

By sec. 31 of The Supreme and Exchequer Courts Act (R.S.C. ch. 135) "no appeal shall be allowed in any case of proceedings for or upon a writ of habeas corpus arising out of any claim for extradition made under any treaty." An application to the court to fix a day for hearing a motion to quash an appeal from an order refusing a habeas corpus in an extradition matter should be refused, the matter being coram non judice and there being no necessity for a motion to quash.

RE LAZIER (NO. 2), (CAN.) 419

**False pretences**

Summary trial of.

591, 592

**False trade description***Advertisement of sale of goods—Oral evidence to connect.*

The use of the words "quadruple plate" in an advertisement of sale of silverplated ware may constitute a false trade description, the application of which is an offence under Cr. Code sec. 446. It is not necessary that a false trade description under Cr. Code sec. 446 should be physically connected with the goods or that it should accompany the same, and oral evidence is admissible to connect the description of the goods in the advertisement with the goods afterwards sold.

R. v. T. EATON COMPANY, LIMITED (NO. 2), (ONT.) 421

**Fishery laws***Fishery regulations—Possession of small sturgeon.*

Upon a charge under the fishery regulations of having in possession sturgeon under the permitted size, the doctrine of

**Fishery laws—Continued.**

mens rea applies; and a conviction should not be made against the master in respect of the unauthorized possession by the servant, if there is no knowledge or connivance on the master's part in regard thereto.

R. v. VACHON, (B.C.) 558

**Fine**

Summary conviction; Omission to adjudge forfeiture as well as payment.

536, 539

Addition of, to imprisonment.

599

Application of fines.

594, 597

Enforcing payment of; Procedure.

596

**Foreign law**

See EXTRADITION.

**Forfeiture**

See FINE.

**Forgery***Signing document by procuration without authority.*

An indictment may be laid under Criminal Code section 431, for unlawfully and with intent to defraud signing a promissory note by procuration, although the name signed is the name of a testamentary succession or of an estate in liquidation (*e.g.*, "Estate John Doe"), but if the indictment does not disclose the particulars, an order will be made against the Crown to furnish particulars of the names and capacities of the persons representing such estate at the time when the offence is alleged to have been committed, and directing that the defendants be not arraigned until after the particulars have been delivered.

R. v. WEIR (No. 2), (QUE.) 155

*Signature in name of non-existent person.*

Where a person passing under an assumed name falsely represents that he is in the employment of a certain firm, and that he is authorized to make a draft upon such firm, his signature in such assumed name to a draft upon the firm, and his fraudulent negotiation of it, constitute forgery, if the credit obtained in negotiating the bill was not personal to himself alone, without relation to his supposed employers, and if the false name, although that of a non-existent person, was assumed for the very purpose of perpetrating the fraud.

RE M. B. LAZIER, (ONT.) 167

**Forgery—Continued.***Uttering—Allegation of knowledge.*

In charging the offence of uttering a forged instrument, the indictment must aver that the defendants made use of or uttered the instrument knowing it to have been forged. A count of an indictment charging the defendant with having, with intent to defraud, unlawfully made use of and uttered a promissory note, alleged to have been made and signed by one of the defendants by procuration, without lawful authority or excuse and with intent to defraud, is defective if it does not also allege that the defendants knew it to have been so made and signed. Such a defect is one of substance and cannot be amended under Cr. Code, section 629.

R. v. WEIR (No. 5), (QUE.) 499

Note on forgery by signing fictitious name.

181

**Fraud**

See FALSE PRETENCES.

**Gaming***Deal determined by chances of the game.*

The game of "black jack" is a game of chance, and a place kept or used for playing it, although not kept for gain, is a common gaming house under Cr. Code, sec. 196 (b). The keeping of a house, room or place for playing a game of chance or mixed game of chance and skill in which the chances of the game are in favour of the player who is the dealer or banker therein for the time being, is an indictable offence under secs. 196 and 198 of the Criminal Code, if the position of dealer or banker passes from one player to another by the chances of the game and not by rotation.

R. v. PETRIE, (B.C.) 439

*Gaming house—Voluntary allowances to proprietor.*

A room resorted to for the purpose of playing the game of poker is not shewn to be kept "for gain" under Cr. Code 196 (a) by the mere proof that the proprietor who participated in the game on equal terms with the others, was allowed by the consent of the players, and not as a matter of right nor as a condition on which the playing took place, to take small sums from the stakes on several occasions by way of reimbursement for refreshments provided by him to the players, where such sums are not shewn to exceed the cost or value of the refreshments.

R. v. SAUNDERS, (ONT.) 495

**Gaming—Continued.***Gaming house—Discretion to refuse summary trial.*

The term "disorderly house" in Cr. Code 783 (f) applies only to those cases which fall within the statutory definition of that term given in Cr. Code 198. Upon a charge under Cr. Code 783 and 784 of keeping a 'disorderly house' in that the accused is alleged to be keeping a gaming house, the police magistrate has jurisdiction to hear and determine the charge summarily without the consent of the accused, but the exercise of that jurisdiction is discretionary with the magistrate, and he may instead proceed as with a preliminary inquiry, and commit the accused for trial.

EX PARTE JOHN COOK, (B.C.) 72

Evidence of common gaming house and unlawful gaming; Code Amendment of 1900.

584, 585

**Grand Jury***Indictment—Initialing names of witnesses.*

Cr. Code sec. 645, which enacts that the foreman, or some member of the grand jury acting for him, shall initial on the bill of indictment the name of each witness sworn and examined, and which requires that the name of every witness examined, or intended to be examined, shall be endorsed on the bill, is directory only; and the omission to so initial does not invalidate the indictment.

R. v. TOWNSEND, (N.S.) 29

Procedure in Nova Scotia.

587

**Habeas corpus***Imposing terms on ordering discharge.*

The court may as a condition to a prisoner's discharge on habeas corpus impose the term that he shall undertake that no action shall be brought by him against any person in respect of the prosecution and conviction or of his imprisonment thereunder.

R. v. HORTON, (N.S.) 84

*In Province of Quebec.*

Under Cap. 95 of the Revised Statutes of Lower Canada of 1861, which is still in force, the Superior Court has jurisdiction to issue a writ of habeas corpus, and decide upon it upon the petition of a person kept in jail in virtue of a conviction in a criminal matter. The Court cannot on a writ of habeas corpus revise on its merits the decision of the Judge who has pronounced the conviction, nor adjudge on the culpability of the petitioner.

R. v. BOUGIE, (QUE.) 487

Issuing writ of; Ontario practice; Signature by Judge.

551

## Handwriting

### *Comparison with admitted handwriting.*

A jury may properly make a comparison of doubtful or disputed handwriting, and draw their own conclusion as to its authenticity, if the admittedly genuine handwriting and the disputed handwriting are both in evidence for some purpose in the case, although no witness was called to prove the handwriting to be the same in both.

R. v. DIXON (No. 2.), (N.S.) 220

## Hard labour

### *In default of paying fine.*

Criminal Code sec. 872 enacting that in default of payment of a fine the defendant may be imprisoned "in the manner and for the time" mentioned in the Act or law authorizing the conviction, does not authorize an award of imprisonment *with hard labour* in default of payment of the fine, unless the Act or law under which the conviction is had provides the same in respect of the non-payment of the penalty; and this notwithstanding such Act or law authorizes a punishment in the first instance by imprisonment with hard labour.

R. v. HORTON, (N.S.) 84

[But see amendment of sec. 872 of the Code, ante p. 596.]

### *Unauthorised penalty of hard labour—Amended conviction.*

A summary conviction which illegally imposes imprisonment *with hard labour* in default of payment of the fine, may be amended at any time before it is acted upon, by the return of an amended conviction omitting the words "with hard labour" but in other respects conforming to the adjudication. Such an amended conviction may be returned in answer to certiorari process although the first conviction has been transmitted by the magistrate, pursuant to a statutory requirement, to the court to which an appeal might be taken therefrom.

R. v. MCANN, (B.C.) 110

### *Imprisonment—Default in paying fine.*

Imprisonment with hard labour may be imposed in default of payment of a fine and costs upon a summary trial of an indictable offence under part LV. of the Code.

R. v. BURTRESS, (N.S.) 536

Note on jurisdiction of magistrate to award hard labour in default of distress; Cr. Code 788, 872 (c). 538

On summary conviction in default of distress or of payment of fine. 596

**Holiday**

Verdict, etc., received on holiday. 586

**Husband and wife***Failure to provide necessities for wife.*

It is purely a question of fact upon a charge, under Cr. Code sec. 210, of omitting to provide necessities for a wife, whether the acts proved are such that the health of the wife is likely to be permanently injured by reason thereof; and the words "permanently injured" have no technical meaning as used in that section.

R. v. BOWMAN, (N.S.) 410

On a case reserved upon a conviction for failing to supply necessities to a wife whereby her health is likely to be permanently injured, the conviction should be affirmed, if there is some evidence from which an inference may be drawn that such injury was likely to result from the non-supplying of necessities.

R. v. MCINTYRE, (N.S.) 413

**Ice cream**

Sale of on Sunday; Lord's Day Act of Ontario; "Work of necessity." 356

**Idiots**

Carnal knowledge of. 566

**Imprisonment**

See COMMITMENT.

**Indecent assault***Evidence improperly admitted—Statement of complaint.*

Upon a charge of rape, statements made by the complainant to a police officer on the day after the offence was alleged to have been committed and in response to his inquiries, the complainant having on the day of the offence complained to others of an assault but not of rape, are not admissible in evidence either as part of the *res gestæ* or as in corroboration. If on an indictment for rape the jury acquit the accused of that offence but find him guilty of indecent assault, the verdict should stand notwithstanding the improper admissions in evidence of statements so made by the complainant after the alleged offence, if the other evidence in the case is ample to warrant the verdict of indecent assault.

R. v. GRAHAM, (ONT.) 22



## Indictment

### *Consent of Attorney-General to prefer.*

Where the preferring of an indictment is authorized solely upon the ground that a direction of the Attorney-General has been given therefor (Cr. Code 641), the written consent or direction must be one with regard to the particular case, and the offence must be specified therein; and a general direction in writing by the Attorney-General authorizing counsel to take charge of the criminal prosecution for the Crown at the sittings of the court will not suffice.

R. v. TOWNSEND, (N.S.) 29

### *Grand jury—Initialing names of witnesses.*

Cr. Code sec. 645, which enacts that the foreman, or some member of the grand jury acting for him, shall initial on the bill of indictment the name of each witness sworn and examined, and which requires that the name of every witness examined, or intended to be examined, shall be endorsed on the bill, is directory only; and the omission to so initial does not invalidate the indictment.

R. v. TOWNSEND, (N.S.) 29

### *Form of—Sufficiency—Cr. Code 611.*

An indictment is sufficient in form if it contains all the allegations essential to constitute the offence and charges in substance the offence created by the statute; and it is immaterial in what part of the same the averment is contained, or that words of equivalent import are used instead of the language of the statute. An indictment charging bank officials with having made a monthly report, etc., "a wilful, false and deceptive statement" of and concerning the affairs of the bank, with intent to deceive, sufficiently charges the offence, under section 99 of The Bank Act, of having made "a wilfully false or deceptive statement in any return or report" with such intent.

R. v. WEIR (NO. 1), (QUE.) 102

### *During preliminary enquiry—Judge's direction to prefer.*

An endorsement made and signed by the judge upon an indictment by which he "directs" that the indictment be submitted to the Grand Jury, is a sufficient "consent of the judge, under Criminal Code sec. 641, to the preferring of the indictment. An accused against whom an indictment is preferred, under the authority of a judge's consent under Criminal Code sec. 641, is not entitled to have the indictment quashed by reason of the

**Indictment—Continued.**

fact that a preliminary enquiry in regard to the same offence was at the same time pending before a justice of the peace upon which the latter had not given his decision for or against committal for trial.

R. v. WEIR (NO. 2.), (QUE.) 155

*What amendments allowable.*

The court may, at the trial, amend an indictment if the amendment does not change the character or nature of the charge, and if the accused cannot be prejudiced by the change either as regards the evidence applicable or the defence raised. If the amendment asked would substitute a different transaction from the first alleged, or would render a different plea necessary, it ought not to be made.

R. v. WEIR (NO. 3), (QUE.) 262

*Defect in substance—Motion to quash.*

Each count of an indictment must contain a statement of all the essential ingredients which constitute the offence charged. In charging the offence of uttering a forged instrument the indictment must aver that the defendants made use of or uttered the instrument knowing it to have been forged. A count of an indictment charging the defendant with having, with intent to defraud, unlawfully made use of and uttered a promissory note, alleged to have been made and signed by one of the defendants by procuration without lawful authority or excuse and with intent to defraud, is defective if it does not also allege that the defendants knew it to have been made and signed. Such a defect is one of substance and cannot be amended under Cr.

Code, sec. 629.

R. v. WEIR (NO. 5), (QUE.) 499

Note on quashing indictment for insufficiency.

108

Joint indictment ; Discretion to order separate trials.

351, 353

Who may prefer an indictment.

579

**Information***Police Magistrate—Refusal to proceed with information.*

Where a police magistrate receives an information, and, after hearing and considering the allegations of the informant, decides that the statute invoked in support of the prosecution does not apply, and that what is charged does not constitute an offence, and therefore refuses to issue either a summons or warrant against the accused, a mandamus does not lie to compel him to do so.

RE E. J. PARKE, (ONT.) 122

**Information—Continued.***Information irregularly signed and sworn.*

An information under oath which on its face purports to be the information of a person other than the person who has signed and sworn to the same is bad.

Where a warrant of arrest based upon such defective information has been issued to enforce the attendance of the accused before a magistrate, and the magistrate at the opening of the trial amends the information by inserting therein, in the presence of and with the consent of the person who had signed and sworn to the information, the latter's name in the place of the name so appearing on the face of the information, it is necessary that the information should be re-sworn.

Where the defendant has been arrested under the warrant and when brought before the magistrate takes objection to the amended information upon the ground that it should be re-sworn after the amendment, and has the objection noted, he does not waive the objection by proceeding with the trial and cross-examining witnesses.

R. v. McNUTT, (N.S.) 184

*Need not be sworn unless warrant to issue.*

A summons may be issued upon an information before a Justice of the Peace for an offence punishable on summary conviction, although the information has not been sworn (Cr. Code 843, 845 (2)); but before a warrant can be issued to compel the attendance of the accused, there must be an information in writing and under oath (Cr. Code 558, 843).

R. v. WILLIAM McDONALD, (N.S.) 287

*Temperance Act of 1864—Successive complaints.*

Section 17 of the Temperance Act of 1864 which provides that two or more offences by the same party may be included in one complaint, and that, whatever may be the number of offences included in one complaint, the maximum of penalty which may be imposed for them all shall in no case exceed \$100, is to be construed as permissive and not as imperative; and, if separate complaints are laid in respect of each offence, convictions obtained thereon with accumulated penalties of more than \$100 may be enforced, although the offences were all prior to the laying of the first information. There is no presumption that a complaint made for a single offence under that Act is to include all offences to be charged against the accused thereunder previous to the date of the complaint and within the three months' limitation within which prosecutions are required to be brought.

WENTWORTH v. MATHIEU, (IMP.) 429

## Intent

### *Proof of intent—Theft—Evidence of similar acts.*

Notwithstanding Cr. Code sec. 777 authorizing the adjournment of a trial, it is not competent for a judge trying a charge without a jury under the Speedy Trials clauses of the Code to postpone his decision on the first charge until he has heard the evidence on several other charges against the same accused party, and to then decide the question of guilt in all.

To interject one trial into another trial of the same accused person for another offence is a proceeding which prejudices his defence and entitles him to a new trial upon both charges.

If time be required in the first case for deliberation on the question of guilt after hearing the evidence, an adjournment may be made, but to shew the animus of an act, evidence of previous and subsequent conduct in the commission of other acts of a like character is admissible, although such other acts are in themselves crimes.

R. v. McBERNY, (N.S.) 339

## Intoxicating liquors

See CANADA TEMPERANCE ACT.

LIQUOR LICENSE.

## Jurisdiction

### *Supreme Court of Canada—Habeas corpus.*

The jurisdiction of a judge of the Supreme Court of Canada in matters of habeas corpus in any criminal case under any Statute of Canada is limited to an inquiry into the cause of commitment as disclosed by the warrant of commitment.

EX PARTE MACDONALD, (CAN.) 10

### *Illegal arrest—Warrant without sworn information.*

Although an arrest has been illegally made under an invalid warrant, jurisdiction attaches to the magistrate when the person arrested is brought before him; and the subsequent detention and commitment may be justified under the order then made by the magistrate.

MCGUINNESS v. DAFOE, (ONT.) 139

### *Summary conviction—Service of summons.*

Service of a summons to appear before a magistrate to answer a charge of having committed an offence punishable by summary conviction is not validly made although left with the defendant's wife at his usual place of abode (Cr. Code 562), if

**Jurisdiction—Continued.**

the defendant was then absent from Canada and remained away until after the hearing. The magistrate in such a case acquires no jurisdiction over the person of the defendant, and a conviction made in the defendant's absence upon such service will be quashed.

EX PARTE DONOVAN, (N.B.) 286

*Failure to have witness sign depositions.*

Non-compliance with section 590 of the Criminal Code which requires that depositions taken before magistrates in summary proceedings shall be signed by the witness is not a matter affecting the jurisdiction of the magistrates to convict.

EX PARTE DOHERTY, (N.B.) 310

*Criminal trial court—Powers of presiding judge.*

An order made by the presiding judge of a criminal superior court awarding costs against the private prosecutor in respect of an indictment for assault on which the grand jury found no bill, is not subject to review by or appeal to the court en banc. Where the application for such an order has been made on the last day of the term of the criminal court and judgment reserved thereon the order may be legally made out of term nunc pro tunc as of the date of the application, the delay in such case being the act of the court and not being due to the neglect or fault of the applicant.

R. v. MOSHER, (N.S.) 312

*Not conferred by consent.*

Consent does not confer jurisdiction, and the accused may, upon an appeal by way of case reserved, object to the jurisdiction of the tribunal he has himself selected.

R. v. SMITH, (N.S.) 467

Jurisdiction of magistrate; Appearance of accused compelled by irregular process; Subsequent detention and commitment; Note on validity of.

150

Of magistrate where offence committed on the boundary.

578

**Interdiction**

See LIQUOR LICENSE.

**Jury***Swearing the jurors—Irregularity.*

The fact that the jurors were set aside, rejected or sworn as they were drawn, without first calling the full number required for a jury, does not invalidate the trial, nor constitute a deprivation of the full right of challenge.

R. v. WEIR (NO. 3), (QUE.) 262

Note on Calling the jury.

272

Note on Challenge of jurors.

273

**Justification**

See LIBEL.

**Keeping the peace***Finding sureties to keep the peace—Commitment.*

When a justice of the peace makes an order under Cr. Code section 959, requiring a person to give security to keep the peace, he must fix the amount of the recognizance to be given. A justice's order that the accused give security to keep the peace for one year, but not fixing any amount nor a term of imprisonment, in default, will not support a commitment thereunder. A warrant of commitment under Cr. Code section 959 and form VVY, can only be issued after the defendant's refusal or neglect to furnish the required security, proved and recorded subsequently to the order requiring the security, and it must recite such refusal or neglect. RE JOHN DOE, (QUE.) 370

**Kidnapping**

Amendment of 1900.

568

**Larceny**

See THEFT.

**Libel***Justification—Publication in the public interest.*

In a prosecution for an alleged defamatory libel contained in a newspaper article, condemning an employer's dismissal of employees belonging to a trade union and charging that the distribution of certain gratuities by the employer to his employees was impelled by motives of selfishness on his part and was for the purpose of winning public approval and favorable public comment through press notices thereof, a plea of justification will not be struck out on the objection that the facts therein alleged do not shew that it was for the public benefit that the publication should be made, if such plea contains a charge that the press notices favorable to the complainant were published at his instance. If the complainant in a prosecution for defamatory libel has himself called public attention to the subject matter of the alleged libel by obtaining the publication of newspaper articles commending his conduct therein, he thereby invites public criticism thereof and cannot object that the answer to his own articles is not a publication in the public interest. R. v. BRAZEAU, (QUE.) 89

Note on Publication in the public interest as a justification. 92, 93

Defamatory libel defined in Code Amendment, 1900.

570

## License

Municipal license of pawnbrokers.

379

And see LIQUOR LICENSE.

## Liquor license

### *Exception of sale by registered druggist.*

Where the defence to a summary prosecution for selling liquor without a license is that the accused was entitled to do so under a statutory exception respecting registered druggists, and by statute the onus is expressly cast on the accused to prove himself within the exception, and provision made for proving the register by the production of a printed copy thereof, the viva voce testimony of the accused that he is a duly registered druggist is not competent evidence of the fact, and the magistrate may disregard the same, although no objection was taken to the admission of such testimony.

R. v. HERRELL (No. 2), (MAN.) 15

### *Witness—Privilege—Liquor License Act (Ont.)*

Upon the prosecution under the Ontario Liquor License Act of a person charged as a licensee with having sold liquor during prohibited hours, a witness, other than the defendant or the wife or husband of a defendant, may properly refuse to answer any question which he swears may tend to subject him to prosecution for a penalty under that Act.

RE ASKWITH, (ONT.) 78

### *Order of interdiction—Requisites of.*

An order made by a magistrate under sec. 124 of the Ontario Liquor License Act, forbidding the sale of liquor to a person named, is invalid to support a conviction for a contravention thereof, if it does not appear that the order of interdiction was made in open court, that the person interdicted was summoned before the court, and that proof was made to the court of his excessive drinking of liquor, and that the same resulted in a mis-spending, etc., of his estate, or great injury to his health, etc., in the terms of the statute. The order should not prohibit the *giving* but only the *sale* of liquor to the interdicted person.

R. v. CHARLES MOUNT, (ONT.) 209

### *Sale to interdicted person—Liquor consumed by others.*

A magistrate's order prohibiting the sale of liquor to an interdicted drunkard under the Ontario Liquor License Act constitutes a prohibition of any sale of liquor to such drunkard even

**Liquor license—Continued.**

though the same is delivered to and consumed by others and although no portion of the liquor was actually delivered to or consumed by the interdicted person.

R. v. CHARLES MOUNT, (ONT.) 209

*'Temperance drinks'—Percentage of alcohol.*

Diluted lager beer showing on analysis an average strength of 2.05 per cent. of alcohol is an intoxicating liquor within the prohibition of the Ontario Liquor License Act.

R. v. McLEAN, (ONT.) 323

**Limitation**

Of total of fines.

429

**Lottery**

Amendment of 1900.

566

**Magistrate**

See JURISDICTION.

POLICE MAGISTRATE.

**Mandamus***Warrant of arrest—Magistrate's refusal to issue.*

That a magistrate did not properly appreciate the evidence submitted upon an application for the issue of a warrant of arrest for an indictable offence is not a ground for a mandamus to compel him to grant a warrant against his opinion, formed in good faith.

THOMPSON v. DESNOYERS, (QUE.) 68

**Manslaughter***Indictment of corporation for—Demurrer.*

A corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others. Cr. Code secs. 213 and 220, as to want of care in the maintenance of dangerous things, do not extend the criminal responsibility of corporations beyond what it was at common law. There is no power under Code section 639 or otherwise to impose a fine or any other punishment, in lieu of imprisonment, for the offence of manslaughter, and there is consequently no judgment or sentence applicable to a conviction of a corporation for that offence.

R. v. GREAT WEST LAUNDRY CO., (MAN.) 514



**Manslaughter—Continued.***Corporation—Neglect of duty causing death.*

Although a corporation cannot be guilty of manslaughter, it may be indicted, under Cr. Code sec. 252, for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge or structure which it was its duty to so maintain, and this notwithstanding that death ensued at once to the person sustaining the grievous bodily injury. A fine is the punishment which must be substituted under Cr. Code sec. 639 in the case of a corporation, in lieu of the imprisonment mentioned in Cr. Code sec. 252, and the amount is in the discretion of the court (Cr. Code sec. 934). The expression "grievous bodily injury" includes injuries immediately resulting in death, and as a corporation is not amenable to a charge of manslaughter, the death is as to it a circumstance in aggravation of the crime, and does not enlarge the nature of the offence.

R. v. UNION COLLIERY CO., (B.C.) 523

**Marriage**

"Conjugal union"; Polygamy; Note on Cr. Code, 278. 330

**Massage***"Practising medicine"—Manual manipulation.*

A professed diagnosis of an ailment, followed by a manual manipulation of the patient, for reward, as a means of curing disease is not "practising medicine" under the Ontario Medical Act.

R. v. VALLEAU, (ONT.) 435

**Master and servant***Unauthorized possession by servant—Liability of master.*

Upon a charge under the Fishery regulations of having in possession sturgeon under the permitted size, the doctrine of mens rea applies; and a conviction should not be made against the master in respect of the unauthorized possession by the servant, if there is no knowledge or connivance on the master's part in regard thereto.

R. v. VACHON, (B.C.) 558

Liability of master as a guardian or head of a family. 541

**Medical registration***Patent medicines—Diagnosis.*

The selling of a "patent medicine" or specific for the treatment of a disease, after enquiries by the seller into the nature of the complaint and its symptoms, is practising medicine if the selection of the remedy is made by the seller; and the seller, not being a registered medical practitioner, is guilty of practising medicine "for gain or hope of reward," although no charge is made except for the medicine.

R. v. BARNFIELD, (B.C.) 161

**Medical registration—Continued.***Massage—"Practising medicine."*

A professed diagnosis of an ailment, followed by a manual manipulation of the patient, for reward, as a means of curing disease is not "practising medicine" under the Ontario Medical Act.

R. v. VALLEAU, (ONT.) 435

**Medical aid***Failure to provide medical aid.*

Section 211 of the Code does not impose a criminal responsibility upon the master to provide the servant with medical attendance or medicine, and, *semble*, per Rouleau, J., medical aid is not within the term "necessaries" under Cr. Code, 210.

R. v. COVENTRY, (N.W.T.) 541

**Menaces**

See THREATENING LETTER.

**Mens rea**

Unauthorized possession by servant; Liability of master;  
Fishery laws; Illegal possession of prohibited fish.

558

**Merchant Shipping Act**

Harbouring deserting seaman; Offence by Canadian in Canada;  
Application of Canadian Act; Constitutional law.

402

**Misdirection**

See REASONABLE DOUBT.

**Municipal law**

See PAWNBROKER.

**Necessaries**

Breach of the duty to provide.

567

**Negligence***Corporation—Maintaining unsafe railway bridge.*

Although a corporation cannot be guilty of manslaughter, it may be indicted, under Cr. Code sec. 252, for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge or structure which it was its duty to so maintain, and this notwithstanding that death ensued at once to the person sustaining the grievous bodily injury. A fine is the punish-

**Negligence—Continued.**

ment which must be substituted under Cr. Code sec. 639 in the case of a corporation, in lieu of the imprisonment mentioned in Cr. Code sec 252, and the amount is in the discretion of the court (Cr. Code sec. 934). The expression "grievous bodily injury" includes injuries immediately resulting in death, and as a corporation is not amenable to a charge of manslaughter, the death is as to it a circumstance in aggravation of the crime, and does not enlarge the nature of the offence.

R. v. UNION COLLIERY CO., (B.C.) 523

Negligent maintenance of dangerous machinery; Unprotected shafting; Omission of legal duty.

514

**New Trial**

See RESERVED CASE.

**Non-support**

See HUSBAND AND WIFE.

**Nova Scotia**

Practice as to endorsing indictments; Omission of words "true bill."

29

**Nunc pro tunc**

*Power to make order 'nunc pro tunc.'*

An order made by the presiding judge of a criminal superior court awarding costs against the private prosecutor in respect of an indictment for assault on which the grand jury found no bill, is not subject to review by or appeal to the court en banc. Where the application for such an order has been made on the last day of the term of the criminal court and judgment reserved thereon the order may be legally made out of term nunc pro tunc as of the date of the application, the delay in such case being the act of the Court and not being due to the neglect or fault of the applicant.

R. v. MOSHER, (N.S.) 312

**Objection**

To information, conviction, warrant, etc.; Code Amendment of 1900.

595

**Obscene matter**

Publication of.

562, 563

**Obstructing peace officer**

*Consent of accused necessary to summary trial.*

The provisions of Cr. Code 144 fixing the punishment for which anyone guilty of obstructing a peace officer shall be liable "on summary conviction," are controlled by Code sections 783 and 786, and the charge cannot be summarily tried by a magistrate except with the consent of the accused given in conformity with section 786.

R. v. CROSSEN, (MAN.) 152

**Patent medicines**

See MEDICAL REGISTRATION.

**Pawnbroker**

*Municipal license—Montreal City Charter, art. 503.*

A right of appeal is not a matter of procedure under article 503 of the Montreal city Charter, which enacts that the provisions of part LVIII. of the Criminal Code shall apply to prosecutions under the charter "as regards the mode of procedure" therein; and there is consequently no appeal from the Recorder's Court of Montreal to the Court of Queen's Bench, from a conviction for carrying on the business of a pawnbroker without a license.

SUPERIOR v. CITY OF MONTREAL, (QUE.) 379

**Penalty**

*Limitation of total of penalties.*

Section 17 of the Temperance Act of 1864 which provides that two or more offences by the same party may be included in one complaint, and that whatever may be the number of offences included in one complaint, the maximum of penalty which may be imposed for them all shall in no case exceed \$100, is to be construed as permissive and not as imperative; and, if separate complaints are laid in respect of each offence, convictions obtained thereon with accumulated penalties of more than \$100 may be enforced, although the offences were all prior to the laying of the first information.

There is no presumption that a complaint made for a single offence under that Act is to include all offences to be charged against the accused thereunder previous to the date of the complaint and within the three months' limitation within which prosecutions are required to be brought.

WENTWORTH v. MATHIEU, (IMP.) 429

**Penitentiary convicts**

Imprisonment for further terms. 598

**Pharmacy**

Regulation of sale of liquors ; Exception in favour of registered druggists ; Proof of registration. 15

**Pocket picking**

*Material ingredients of offence to be proved.*

Where in a charge of pocket picking the evidence in the opinion of a Court of Appeal goes no further than to support a reasonable surmise or suspicion that the accused was guilty of the offence and lacks the material ingredients necessary to establish guilt, the conviction will be quashed upon an appeal under Cr. Code secs. 744 and 746.

R. v. WINSLOW, (MAN.) 215

**Police magistrate**

*Session in city having a separate magistrate.*

A town police magistrate in Ontario may, in respect of an offence under a provincial statute committed in part of the same county for which there is no police magistrate, take the information at a city or town (within the county) having a separate police magistrate ; and may there try the case as an ex-officio justice of the peace, having the powers of two justices of the peace under the Ontario Police Magistrates' Act.

R. v. MCLEAN, (ONT.) 323

**Polygamy**

*Indian marriage with two women.*

An Indian who according to the marriage customs of his tribe takes two women at the same time as his wives, and cohabits with them, is guilty of an offence under sec. 278 of the Criminal Code.

R. v. " BEAR'S SHIN BONE," (N.W.T.) 329

Amendment of 1900. 568

**Postal law**

Posting immoral literature. 563

**Practising medicine**

See MEDICAL REGISTRATION.

**Preliminary enquiry***Waiver of—Effect on claim to a speedy trial.*

Semble, an accused person may, upon a preliminary enquiry, waive the preliminary examination into the charge and consent to be committed for trial without any depositions being taken ; but as the "charge" in the County Judge's Criminal Court must be prepared from the depositions (Cr. Code 767), the accused committed without depositions having been taken, has no right to elect to be tried at the County Judges' Criminal Court.

(But see Code Amendment Act 1900 in appendix to this volume).

R. v. JAMES GIBSON, (N.S.) 451

**Privilege**

See WITNESS.

**Provincial law**

Offence under provincial statute ; Municipal law ; Appeal from order of a superior court quashing summary conviction ; Motion to quash appeal.

306

**Police court**

Excluding public from court room in certain cases.

577

**Public interest**

Publication in the, as a justification of alleged libel.

89

Of obscene matter.

562, 563

**Rape***Statement of complainant after offence.*

Upon a charge of rape, statements made by the complainant to a police officer on the day after the offence was alleged to have been committed and in response to his enquiries, the complainant having on the day of the offence complained to others of an assault but not of rape, are not admissible in evidence either as part of the *res gestæ* or as in corroboration.

R. v. GRAHAM, (ONT.) 22

*Verdict of indecent assault.*

If on an indictment for rape the jury acquit the accused of that offence but find him guilty of an indecent assault, the verdict should stand notwithstanding the improper admission in evidence of statements made by the complainant after the alleged offence, if the other evidence in the case is ample to warrant the verdict of indecent assault.

R. v. GRAHAM, (ONT.) 22

**Rape—Continued.***Complaint by prosecutrix—Admissibility of details.*

Upon the trial of a charge of rape the whole statement made by the woman by way of complaint shortly after the alleged offence, including the name of the party complained against and the other details of the complaint, is admissible in evidence as proof of the consistency of her conduct and as confirmatory of her testimony regarding the offence, but not as independent or substantive evidence to prove the truth of the charge. Whether or not the complaint was made within a time sufficiently short after the commission of the offence as to admit evidence of the particulars of the complaint, is a question to be decided by the court under the circumstances of the particular case ; but it is nevertheless the province of the jury to take into consideration the time which intervened, in weighing the probability of its truth. The lapse of seven days between the date of the offence and the time of making complaint thereof was held insufficient under the circumstances to exclude testimony of the particulars of the complaint. *R. v. RIENDEAU, (QUE.)* 293

*Proof that civil action taken for damages.*

Proof on behalf of the defence that the injured party or her parents had instituted civil proceedings to recover damages arising from the commission of the alleged rape is properly excluded upon the criminal trial as irrelevant, unless other facts have been disclosed in evidence which tend to show an intent to thereby wrongfully extort money from the accused.

*R. v. RIENDEAU, (QUE.)* 293

Note on complaint by prosecutrix ; Time of, as affecting admissibility of evidence.

304

**Reasonable doubt***Failure to direct as to.*

The failure of the trial judge, *ex mero motu* to direct the jury to give to the prisoner the benefit of any reasonable doubt, is not a good ground for interfering with the verdict in a case where the evidence does not point to any reduced or lesser offence.

*R. v. RIENDEAU, (QUE.)* 293

**Receiving stolen goods**

Summary trial of offence.

591, 592

**Recognizance**

See BAIL.

**Release**

On suspended sentence.

600

**Remand**

Breach of recognizance given on.

578

**Reserved case***Reserved case on Crown's application—Notice of hearing.*

Notice of an application by the Crown for a new trial, and of the hearing of a case reserved on the Crown's application where the accused has been acquitted at the trial, should be served upon the accused personally. The authority of the solicitor acting for the accused in the trial proceedings is prima facie to be presumed to have terminated upon the latter's acquittal; and proof of service upon the solicitor is insufficient in the absence of evidence rebutting such presumption.

R. v. WILLIAMS, (ONT.) 9

*Question of fact or of weight of evidence.*

A question depending upon the facts or the weight of evidence cannot properly be made the subject of a reserved case under Cr. Code sec. 743. On a case reserved upon a conviction for failing to supply necessities to a wife whereby her health is likely to be permanently injured, the conviction should be affirmed, if there is some evidence from which an inference may be drawn that such injury was likely to result from the non-supplying of necessities.

R. v. McINTYRE, (N.S.) 413

**Res judicata***Certiorari—Order quashing search warrant for liquors.*

A judgment on certiorari quashing a search warrant for intoxicating liquors issued under the Canada Temperance Act is not res judicata as to the constable who executed the warrant, if he was not a party to and had no notice of the certiorari proceedings.

SLEETH v. HURLBERT, (CAN.) 197

**Seamen's Act (Can.)***Harboring deserting seaman—Nationality of vessel.*

Per OUMET, J.—Upon a prosecution for harboring and secreting a deserting seaman the procedure to be followed and the punishment to be imposed are governed by the Seamen's Act of Canada if the offence was committed in Canada by a resident



**Seamen's Act (Can.)—Continued.**

of Canada, and section 711 of the Imperial Merchant Shipping Act, 1894, is confirmatory of such rule as regards cases coming within the latter Act.

Per OUIMET, J.—The appeal from a summary conviction under the Seamen's Act of Canada, for harboring and secreting a deserting seaman is under section 879 and not under section 742 of the Criminal Code, and in the Province of Quebec the appeal should be taken to the Crown Side and not to the Appeal Side of the Court of Queen's Bench of that province.

Per WURTELE, J.—Where the information sets up in general terms that the accused had harbored and secreted a seaman who had deserted from a vessel named, but contains no allegation that the vessel was a duly registered British ship, the necessary intentment is that the prosecution is brought under the Seamen's Act of Canada.

Per WURTELE, J.—In such case it is necessary for the accused to plead and prove the vessel to be a duly registered British ship before jurisdiction under the Seamen's Act of Canada is ousted on the ground that the Imperial Merchant Shipping Act governs the case, the punishment provided in the latter statute being limited to cases of desertion from registered British ships, while the Canadian statute applies to ships of all nationalities and whether registered or not.

R. v. O'DEA, (QUE.) 402

**Search warrant***Description of premises to be searched.*

A search warrant for intoxicating liquors issued under the Canada Temperance Act is not invalid because it does not shew on its face that the premises directed to be searched are within the territorial jurisdiction of the magistrate. It is not necessary that the premises directed to be searched should be described in the search warrant by metes and bounds or with other particularity of a like nature, and a direction to search the dwelling house of a named person in a certain township is sufficient. A direction to search several buildings or places in respect of any one charge may be made by the one search warrant.

SLEETH v. HURLBERT, (CAN.), 197

Information to obtain ; Amended form of 1900.

601

**Seduction**

By guardian or employer.

564

"Guardian" defined.

565

Burden of proof of unchastity.

565

**Separate trial***Joint indictment—Separate trials—Discretion.*

Where several persons are indicted jointly, the Crown has the option of having them tried separately instead of together. Where several persons are indicted jointly, none of them can demand a separate trial as a matter of right. When the trial of the defendants jointly instead of separately would work an injustice to any of them, the presiding judge may, on due cause being shown, exercise his discretionary right to direct a separate trial. (Grounds upon which a separate trial is usually allowed, considered.)

R. v. WEIR (NO. 4), (QUE.) 351

Note on Separate trials on joint indictment. 353

**Sessions**

Court of, not to try certain offences under "The Dominion Elections Act." 57b

**Sheriff**

Notice by, after committal of prisoner. 588

**Solicitor***Termination of solicitor's authority.*

The authority of the solicitor acting for the accused in the trial proceeding is prima facie to be presumed to have terminated upon the latter's acquittal; and proof of service upon the solicitor of a notice of an application by the Crown for a new trial and of the hearing of a case reserved is insufficient in the absence of evidence rebutting such presumption.

R. v. WILLIAMS, (ONT.) 9

**Speedy trial***Charges tried consecutively—Finding reserved.*

Notwithstanding Cr. Code sec. 777 authorizing the adjournment of a trial, it is not competent for a judge trying a charge without a jury under the Speedy Trials clauses of the Code to postpone his decision on the first charge until he has heard the evidence on several other charges against the same accused party, and to then decide the question of guilt in all. To interject one trial into another trial of the same accused person for another offence is a proceeding which prejudices his defence and entitles him to a new trial upon both charges. If time be required in the first case for deliberation on the question of guilt after hearing the evidence, an adjournment may be made, but the trial of the subsequent charges must likewise be postponed.

R. v. McBERNY, (N.S.) 339

**Speedy trial—Continued.***Admission to bail without a committal.*

Where upon a preliminary enquiry the justice finds that the evidence is sufficient to put the accused on his trial, and that it does not furnish such a strong presumption of guilt as to warrant a committal for trial (Cr. Code 601), and the accused is in consequence admitted to bail upon finding sureties for his appearance to answer an indictment, but is subsequently rendered to the jail by the sureties under Cr. Code 910, the person so rendered is not "committed to jail for trial" within the meaning of Cr. Code 765, and cannot be tried under the Speedy Trials clauses at the County Judge's Criminal Court. (But see Code Amendment Act 1900 in appendix to this volume).

R. v. JAMES GIBSON, (N.S.) 451

*Election of, by accused—Admission to bail without a committal.*

In order that an accused should have the right to elect to be tried without a jury at the County Judges' Criminal Court, he must have been "committed to jail for trial" (Cr. Code 765), and the County Judges' Criminal Court has no jurisdiction in a case where the magistrate admitted the accused to bail in the first instance under Cr. Code 601, without an order of committal. The committal referred to in sec. 765 of the Criminal Code is a committal by the magistrate and does not include a judge's order made under Cr. Code 910 for the render of the accused to jail at the instance of his bondsmen.

R. v. SMITH, (N.S.) 467

Code Amendment of 1900.

588, 589

**Statutes**

Criminal Code Amendment, 1900.

561

**Stealing children**

Amendment of 1900.

569

**Summary trial***Police magistrate—Discretion to refuse summary trial.*

Upon a charge under Cr. Code 783 and 784 of keeping a "disorderly house" in that the accused is alleged to be keeping a gaming house, the police magistrate has jurisdiction to hear and determine the charge summarily without the consent of the accused, but the exercise of that jurisdiction is discretionary with the magistrate, and he may instead proceed as with a preliminary inquiry, and commit the accused for trial.

EX PARTE JOHN COOK, (B.C.) 72

**Summary trial—Continued.***Consent of accused—Jurisdiction of magistrate.*

The provisions of Cr. Code 144 fixing the punishment for which anyone guilty of obstructing a peace officer shall be liable "on summary conviction," are controlled by Code sections 783 and 786, and the charge cannot be summarily tried by a magistrate except with the consent of the accused given in conformity with section 786.

R. v. CROSSEN, (MAN.) 152

*Right of appeal—Cr. Code 782, 783.*

No appeal lies from the decision of a Judge of the Sessions, Police Magistrate, District Magistrate or other functionary mentioned in Cr. Code sec. 782a (1), holding a "summary trial" under Cr. Code 783.

R. v. RACINE, (QUE.) 446

*Omission to recite consent of accused.*

A summary conviction by a magistrate in respect of a charge in which he has jurisdiction only upon the consent of the accused to a summary trial, is not invalid merely because it omits to state that the accused so consented if in fact the consent was given. The omission to state the consent in the conviction is a 'want of form' which is cured by Code sec. on 800 which provides that a conviction under part LV. shall not be quashed for want of form.

R. v. BURTRESS, (N.S.) 536

*Absolute jurisdiction—Habeas corpus.*

A summary conviction by a magistrate in respect of a charge under part LV. of the Code of an indictable offence which the magistrate has absolute jurisdiction to try without the consent of the accused, is subject to be enquired into upon habeas corpus and certiorari proceedings, notwithstanding the provision of sec. 798 declaring that it shall have the *same effect* as a conviction upon an indictment.

If there was some evidence before the magistrate which would support a conviction unless he gave credence to the evidence given on behalf of the accused, the conviction will be sustained, the weight to be attached to the evidence not being a question reviewable upon habeas corpus and certiorari.

R. v. ST. CLAIR, (ONT.) 551

Jurisdiction of certain magistrates to try without consent. 590

Jurisdiction of magistrate to try with consent; Code Amendment of 1900. 590, 591

## Summons

### *Review of magistrate's decision refusing summons.*

Where a police magistrate receives an information, and, after hearing and considering the allegations of the informant, decides that the statute invoked in support of the prosecution does not apply, and that what is charged does not constitute an offence, and therefore refuses to issue either a summons or warrant against the accused, a mandamus does not lie to compel him to do so.

RE E. J. PARKE, (ONT.) 122

### *Service of—Leaving at usual place of abode.*

Service of a summons to appear before a magistrate to answer a charge of having committed an offence punishable by summary conviction is not validly made although left with the defendant's wife at his usual place of abode (Cr. Code 562), if the defendant was then absent from Canada and remained away until after the hearing. The magistrate in such a case acquires no jurisdiction over the person of the defendant, and a conviction made in the defendant's absence upon such service will be quashed.

EX PARTE DONOVAN, (N.B.) 286

### *Issue of—Information need not be sworn.*

A summons may be issued upon an information before a Justice of the Peace for an offence punishable on summary conviction, although the information has not been sworn (Cr. Code 843, 845 (2)); but before a warrant can be issued to compel the attendance of the accused, there must be an information in writing and under oath (Cr. Code 558, 843).

R. v. WILLIAM McDONALD, (N.S.) 287

### *Issuing summons a judicial act.*

The issue of a summons, whether in relation to an offence punishable summarily or to an indictable offence, is a judicial act. Notwithstanding section 105 of the Canada Temperance Act and section 842 of the Criminal Code, an information charging an offence under the Canada Temperance Act must be laid before two justices, who must concur in directing the issue of the summons, but it is not necessary that the information or the summons issued thereon should be signed by more than one of such justices.

R. v. ETTINGER, (N.S.) 387

### *Defect in service—Waiver.*

The defendant's appearance by counsel upon the return of a magistrate's summons is a waiver of any irregularity in respect

**Summons—Continued.**

of the service not having been effected by a peace officer, although counsel objects on that ground to the hearing being proceeded with. The absence of defendant's counsel from the adjourned sittings at which the magistrate pronounced his judgment, the evidence having been closed at the former sittings at which counsel appeared, does not affect the power of the magistrate to convict, notwithstanding any such irregularity in the service.

R. v. DOHERTY, (N.S.) 505

**Sunday observance***Sale of ice cream—Victualling house.*

The business of keeping a victualling house may be lawfully carried on on Sunday as a "work of necessity" within the exception contained in the Lord's Day Act of Ontario, and the keeper may supply any article which may fairly be considered food or victuals. Ice cream is a food, and the keeper of a victualling house may lawfully sell the same to his customers on Sunday, whether or not other foods are supplied therewith. The Lord's Day Act of Ontario is to be construed as in pari materiâ with the English statute, 29 Car. 2, c. 7, at one time in force in Ontario.

R. v. ALBERTIE, (ONT.) 356

**Suspended sentence**

Release on.

600

**Sureties**

Finding sureties to keep the peace.

370

And see BAIL.

**Temperance drinks**

Intoxicating liquors; Percentage of alcohol; Note on.

327

**Theft***Stealing from the person—'Pocket picking.'*

Where in a charge of pocket picking the evidence in the opinion of a Court of Appeal goes no further than to support a reasonable surmise or suspicion that the accused was guilty of the offence and lacks the material ingredients necessary to establish guilt, the conviction will be quashed upon an appeal under Cr. Code secs. 744 and 746.

R. v. WINSLOW, (MAN.) 215

Of things under seizure.

570

Stealing domestic animals.

571

Summary trial of.

591, 59

**Threatening letter***Threatening with intent to extort.*

Where, in a charge of sending a threatening letter to a person with intent to extort money, it is proved that the accused had stated that he had written a letter to such person, and that he had stated its purport in language to the like effect as the threatening letter, it is not error for the court to admit the threatening letter in evidence without further proof of the handwriting, and to submit it to the jury for comparison with an exhibit, already in evidence, admittedly written by the accused.

R. v. DIXON (No. 2), (N.S.) 220

**Trade**

Code Amendment of 1900, as to combinations in restraint of. 575

**Trade mark**

Code Amendment 1900, as to frauds against bottlers, etc. 572

False trade description by advertisement. 421

**Trial**

In camera in certain cases. 577

And see SEPARATE TRIAL.

SPEEDY TRIAL.

SUMMARY TRIAL.

**Vagrancy**

Amendment of 1900. 567

**Waiver**

See INFORMATION.

**Warrant**

See ARREST.

COMMITMENT.

**Whipping**

Directions as to sentence of. 598

**Wife**

See HUSBAND AND WIFE.

**Witness***Privilege—Liquor License Act ( Ont. ).*

Upon the prosecution under the Ontario Liquor License Act of a person charged as a licensee with having sold liquor during prohibited hours, a witness, other than the defendant or the wife or husband of a defendant, may properly refuse to answer any question which he swears may tend to subject him to prosecution for a penalty under that Act. RE ASKWITH, (ONT.) 78

Resident in another province.	581
Warrant to arrest material witness.	581
Bringing up a prisoner as a witness.	582
Evidence taken under commission.	583

**Words and phrases**

" Accuse."	481
" Bringing a prosecution."	387
" Committed to jail for trial."	451, 467
" Consent."	155
" Costs of commitment."	505
" Counterfeit token of value."	574
" County Attorney."	587
" Court of Appeal."	561, 562
" Disorderly house."	72
" For sentence."	1
" Guardian."	565, 567
" Grievous bodily injury."	523
" Health."	413, 541
" In the manner and for the time."	84
" Instituting."	391
" Intoxicating liquor."	323
" Likely to be permanently injured."	410, 413, 541
" Necessaries."	541
" Not alike favourable to all."	439
" Opinion " of magistrate.	68
" Permanently injured."	410, 413, 541
" Practising medicine."	435
" Superior court of criminal jurisdiction."	562

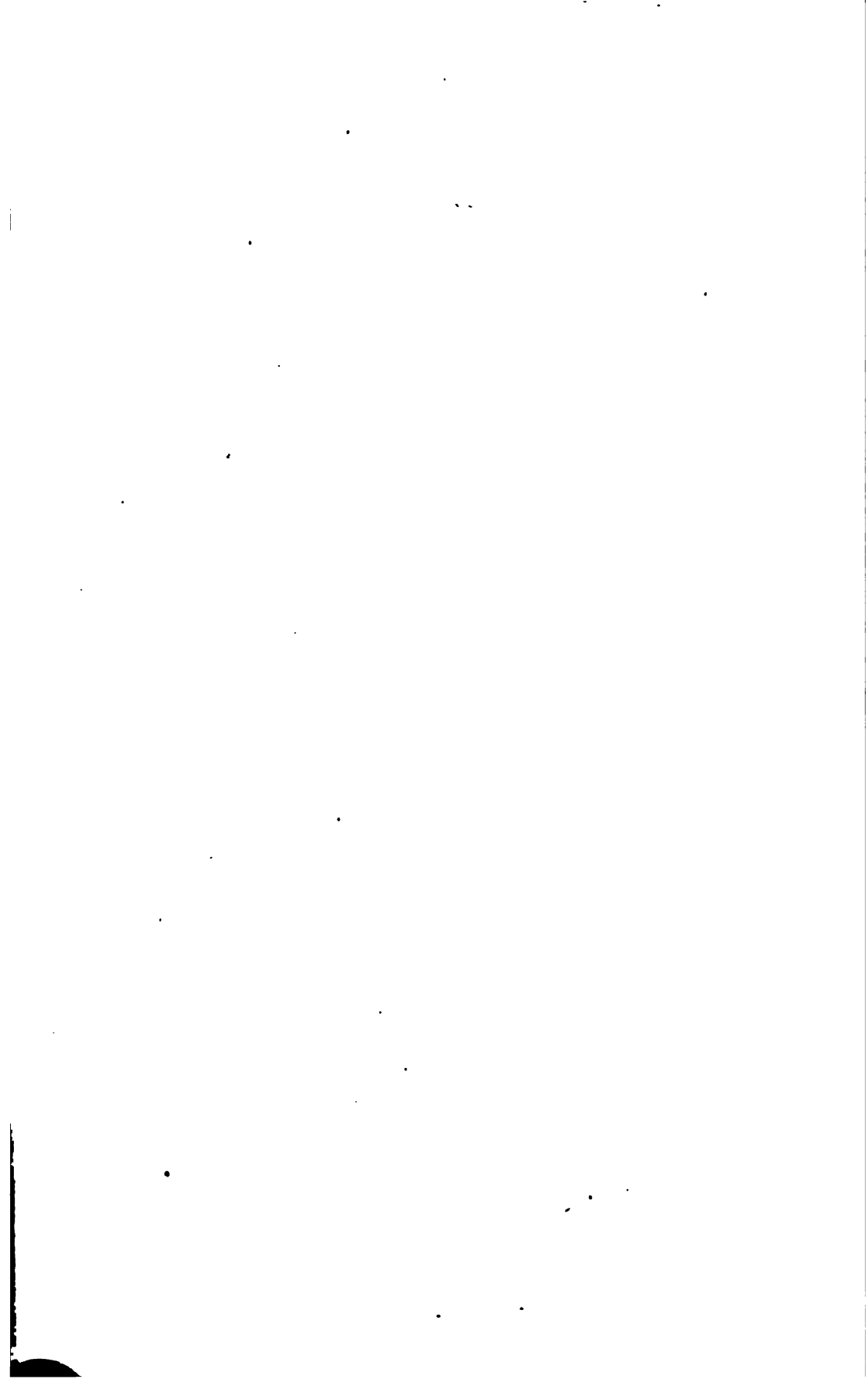












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